

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
	)	Case No. 2:16-cr-046-GMN-PAL
Plaintiff,	)	
	)	Las Vegas, Nevada
vs.	)	Monday, April 10, 2017
	)	8:38 a.m., Courtroom 7C
ERIC PARKER, O. SCOTT	)	
DREXLER, RICKY LOVELIEN,	)	JURY TRIAL DAY TWENTY-SEVEN
STEVEN STEWART, TODD ENGEL	)	
and GREGORY BURLESON,	)	
	)	
Defendants.	)	
	)	<u>C E R T I F I E D C O P Y</u>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE GLORIA M. NAVARRO,  
UNITED STATES DISTRICT JUDGE, CHIEF

APPEARANCES:

See next page

COURT REPORTER:

Heather K. Newman, RPR, CRR, CCR #774  
United States District Court  
333 Las Vegas Boulevard South, Room 1334  
Las Vegas, Nevada 89101  
(702) 471-0002

Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription.

APPEARANCES:

For the Plaintiff:

UNITED STATES ATTORNEY'S OFFICE  
BY: STEVEN W. MYHRE  
ERIN M. CREEGAN  
NADIA JANJUA AHMED  
NICHOLAS D. DICKINSON  
501 Las Vegas Boulevard South, Suite 1100  
Las Vegas, Nevada 89101  
(702) 388-6336

For Defendant Parker:

LAW OFFICE OF JESS R. MARCHESE  
BY: JESS R. MARCHESE  
601 South Las Vegas Boulevard  
Las Vegas, NV 89101  
(702) 385-5377

For Defendant Drexler:

LEVENTHAL AND ASSOCIATES  
BY: TODD M. LEVENTHAL  
626 South Third Street  
Las Vegas, NV 89101  
(702) 472-8686

For Defendant Lovelien:

LAW OFFICE OF SHAWN R. PEREZ  
BY: SHAWN R. PEREZ  
626 South Third Street  
Las Vegas, NV 89101  
(702) 485-3977

For Defendant Stewart:

TANASI LAW OFFICES  
RICHARD E. TANASI  
601 South Seventh Street, 2nd Floor  
Las Vegas, NV 89101  
(702) 906-2411

1 APPEARANCES (Con't):

2 For Defendant Engel:

3 JOHN G. GEORGE, Standby Counsel  
4 600 South Eighth Street  
5 Las Vegas, NV 89101  
6 (702) 625-1183

7 For Defendant Burleson:

8 LAW OFFICE OF TERRANCE M. JACKSON  
9 BY: TERRENCE M. JACKSON  
10 624 South Ninth Street  
11 Las Vegas, NV 89101  
12 (702) 386-0001

13 Also present:

14 Gwen Wilson  
15 Bryan Ginn  
16 Christine Abbott  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E XWITNESSES:PAGE

Eric Parker	Cross-Examination by Dickinson -	24
	Redirect Examination by Marchese -	75
	Recross-Examination by Dickinson -	94

E X H I B I T SEXHIBIT NO:RECEIVED  
IN  
EVIDENCE

472	28
473	30
474	31
475	65
476	60
477	61
478	66
480	69

1 LAS VEGAS, NEVADA; MONDAY, APRIL 10, 2017; 8:38 A.M.

2 --oOo--

3 P R O C E E D I N G S

4 (Outside the presence of the jury at 11:27 a.m.):

5 COURTROOM ADMINISTRATOR: All rise.

6 THE COURT: Thank you. You may be seated.

7 COURTROOM ADMINISTRATOR: This is the time set for  
8 Jury Trial Day Twenty-Seven in Case Number 2:16-cr-046-GMN-PAL,  
9 United States of America vs. Eric Parker, O. Scott Drexler,  
10 Ricky Lovelien, Steven Stewart, Todd Engel, and Gregory  
11 Burleson.

12 Counsel, please make your appearances for the record.

13 MR. MYHRE: Good morning, Your Honor.

14 Steve Mhyre, Erin Creegan, Nadia Ahmed, and  
15 Nick Dickinson on behalf of the United States.

16 THE COURT: Good morning.

17 MR. TANASI: Good morning, Your Honor.

18 Rich Tanasi for Steven Stewart. Also with us at  
19 counsel table is Gwen Wilson and Bryan Ginn.

20 Thank you.

21 MR. MARCHESE: Good morning, Your Honor.

22 Jess Marchese on behalf of Eric Parker and when we're  
23 done with appearances, I have one thing outside the presence.

24 THE COURT: Thank you.

25 MR. LEVENTHAL: Good morning, Your Honor.

1           Todd Leventhal on behalf of Mr. Drexler.

2           THE COURT: Good morning.

3           MR. GEORGE: Good morning. John George on behalf of  
4 Todd Engel.

5           MR. PEREZ: Good morning, Your Honor.

6           Shawn Perez on behalf of Ricky Lovelien.

7           MR. JACKSON: Good morning, Your Honor.

8           Terrance Jackson on behalf of Greg Burleson. Also  
9 with me is Christine Abbott.

10          THE COURT: Good morning.

11          All right. Before we begin, and we're going to just  
12 make sure everyone has a chance to come on in and sit down.

13          So I need to remind everyone, preliminarily, of the  
14 expectations about how court will be conducted. This is a  
15 courtroom; it is not a sporting event. So it is never  
16 appropriate for people to make any expressions of their  
17 opinions, either verbally or through body language, no matter  
18 how much you may agree or disagree with what is being said. So  
19 please be advised that the U.S. marshals who are here today  
20 have been authorized to remove from the courtroom anyone who  
21 makes any inappropriate expressions.

22          In addition, people may not speak out of turn. The  
23 defendants are represented by counsel and any outbursts made by  
24 any of the defendants or any displays of distracting or  
25 inappropriate body language will mean that they will have to be

1 returned to the holding cell where we do have an audio feed so  
2 that they may continue to hear the remainder of the day's  
3 activities, but they will not be permitted to be present in the  
4 courtroom.

5 The same holds true for anyone who disregards the  
6 rules. If you can't obey the rules while you're in the  
7 courtroom, you will be removed but we will continue with the  
8 hearing.

9 Also, please, everyone, make sure that you do not  
10 have any cell phones or iPads, laptops, any kind of electronic  
11 devices. They are not permitted in federal court. Even if  
12 they are turned off or in vibrate mode or private mode, they  
13 are not permitted.

14 The defendants and the defense attorneys are  
15 permitted to have electronic devices with them so that they may  
16 review the evidence and their notes as well as to enable them  
17 to be able to present evidence here in court, but they are not  
18 permitted to record any of the proceedings. There are no audio  
19 recordings or video recordings which are permitted in federal  
20 court.

21 Tables are equipped with microphones; I call them  
22 long necks. So if you would prefer to stay at your table,  
23 you're permitted to do so or if you want to come up to the  
24 podium, that's available as well and we've turned that towards  
25 the witness so we can continue with examinations.

1           Now, Mr. Marchese, you said there was something that  
2           you wanted to state on the record before we bring in the jury?

3           MR. MARCHESE: Yes, Your Honor.

4           It's my understanding that on the cross-examination  
5           of Mr. Parker the Government intends to elicit some information  
6           in reference to the Idaho 3 Percenters. It's our position that  
7           based on the prior court order, I believe it was 1543, that  
8           that information was not to be elicited during the Government's  
9           case-in-chief and only on cross-examination should the defense  
10          open the door to that. It's our position we have not done so.  
11          Mr. Parker joined, started, whatever you want to call it, the 3  
12          Percenters after the fact. The only things I talked about  
13          after the April 12th incident on direct examination were three  
14          things; Long Bow, which was -- there was never anything  
15          elicited about 3 Percenters; a Facebook post referencing  
16          Mr. Stewart, once again, nothing about the 3 Percenters; and  
17          then a very brief colloquy in reference to the day that  
18          Mr. Parker was arrested. So, at this point, I haven't seen how  
19          I've opened the door. I never asked him anything specifically  
20          about the 3 Percenters. So it's my position that anything in  
21          reference to the 3 Percenters should not be brought up on  
22          cross-examination.

23          THE COURT: All right.

24          Mr. Dickinson?

25          MR. DICKINSON: Yes, Your Honor.



1 I believe Mr. Marchese's referring to some pictures  
2 and some posts from Mr. Parker's Facebook page. First, the  
3 Government does not intend to elicit anything about the "Idaho  
4 3 Percent;" that Mr. Parker was a member of the Idaho 3  
5 Percent; that he had any involvement with the Idaho 3 Percent  
6 from here, from whenever he started with Idaho 3 Percent. The  
7 Government does intend to introduce, through Mr. Parker, posts  
8 from his Facebook account that are still, to this day, as of  
9 last night, publicly available. One is June 11th. It is a  
10 picture of him on the bridge with a gun and it says, "You give  
11 peace a chance, I'll cover you," and it does have the little --  
12 I'll present these to the Court after I describe them. It does  
13 have a little 3 Percent down below. The Government believes  
14 that's not overly prejudicial. It doesn't say "Idaho 3  
15 Percent." 3 Percent's been mentioned. Mr. Parker, in his  
16 Long Bow video, testified that he's with the militia, although  
17 he was not part of the militia and that all these groups joined  
18 together.

19 THE COURT: Is that exhibit marked?

20 MR. DICKINSON: Yes. 475, Your Honor.

21 THE COURT: Thank you.

22 MR. DICKINSON: And there's . . . one other one. On  
23 February 17th, 2016, he posts what appears to be a caricature  
24 that I believe someone else did that's Mr. Parker -- appears to  
25 be Mr. Parker, representing him prone out on the bridge that

1 says "resist" and that says "3 Percent." Again, don't intend  
2 to elicit anything about his personal involvement in the 3  
3 Percent in Idaho, or anything else he may or may not have done  
4 with the 3 Percent in Idaho, which we conceded we would not get  
5 into, unless Mr. Marchese opened the door or somebody opened  
6 the door and we don't think that happened, so . . . and I can  
7 present these to the Court, just . . .

8 THE COURT: Yeah. Let me take a look at them.

9 (Brief pause in proceedings.)

10 THE COURT: So, Mr. Marchese, are you asking that  
11 Exhibits 475 and 480 not be admitted or are you asking for  
12 redaction of those two to eliminate the reference to 3 Percent?

13 MR. MARCHESE: Well, there's also another issue in  
14 reference to 480, but I don't want anything in reference to 3  
15 Percent. That's the short and sweet answer.

16 In reference to 480, too, another important point,  
17 Mr. Parker didn't even post this. He's been in custody for 14  
18 months. Someone else did this. Someone else has access to his  
19 Facebook account. I'm sure the Government knows it has  
20 actually been -- the Facebook account is still active. So, if  
21 Mr. Parker didn't do it and he's been in custody, I think  
22 there's a real, a), authentication problem and b), relevance  
23 problem.

24 MR. DICKINSON: I believe . . . What's the date on  
25 that? I apologize for interrupting you.

1                   What's the date on that, Your Honor?

2                   MR. MARCHESE: It says February 17th.

3                   THE COURT: February 17th, 2016.

4                   MR. DICKINSON: Yeah, Your Honor. They were not --  
5 Mr. Parker was not arrested until March.

6                   The Government thinks this is relevant because it  
7 shows his continual -- it does not disavow his involvement in  
8 the conspiracy. It's not just that he left Bunkerville on the  
9 12th and happened to do the Long Bow video and that's the end  
10 of it; he continues to glorify the conspiracy all the way up  
11 until just before he is arrested.

12                  MR. MARCHESE: And actually, Your Honor, I apologize.  
13 I misspoke on that. He -- the Government is correct. I  
14 thought he was in custody at that time. But regardless, the  
15 Court was clear in its order. Unless we opened the door in  
16 reference to the 3 Percent, it doesn't come in and now we have  
17 these exhibits, which I believe are going to be published to  
18 the jury. I just don't see how the Government gets around the  
19 order.

20                  THE COURT: So, Mr. Dickinson, you're saying they're  
21 evidence of his failure to disavow. Was there a claim of  
22 disavowance made on direct examination?

23                  MR. DICKINSON: Well, Your Honor, it -- we're left  
24 with the impression, and we've heard all through the trial,  
25 they left on the 12th; they were only there for 14 days [sic]

1 and Mr. Parker's continued -- there's other pictures as well --  
2 they just don't have 3 Percent on them -- from his Facebook  
3 posting. He's continually talking about promoting the  
4 conspiracy, which has been the Government's theory all along.  
5 These defendants continued to promote the conspiracy to get the  
6 word out so people won't go back to Bundy ranch, et cetera, et  
7 cetera. It's an ongoing conspiracy until they're arrested.

8 THE COURT: Let me see if I'm clear on this.

9 So the . . . okay. Because the motion was to -- it  
10 was the defendants' motion as to 3 Percenters, mention of 3  
11 Percenters --

12 MR. DICKINSON: Correct.

13 THE COURT: -- to exclude outright and find that it  
14 was not to be used. The Government said that they did not plan  
15 to use it in their case-in-chief, and I think that the --  
16 the -- the argument was that it is not 404(b) evidence because  
17 it would only come in for impeachment on rebuttal? Is that --  
18 on cross-examination? I'm not --

19 MR. DICKINSON: The 3 -- the 3 -- the Government's  
20 not intending to get into the 3 Percent, he was a member of the  
21 3 Percent, but he stated in his Long Bow video that he -- I  
22 believe in the militia, all these militia came together. Now  
23 the 12th is over. He's associating -- or the jury can take  
24 what it wants -- you know, he gave a tearful testimony about  
25 how his -- his emotions were on the bridge. He's trying to

1 establish self-defense. This -- this -- the Government would  
2 argue goes contrary to any self-defense arrangement; that he's  
3 glorifying his actions on the bridge on April 12th close to two  
4 years later.

5 THE COURT: All right. So what -- my recollection  
6 was that the argument was whether or not membership in the 3  
7 Percenters was a bad act under 404(b), but I think the  
8 appropriate way to handle this is to redact the -- the 3  
9 Percent in the middle of the bottom of Government's Exhibit 475  
10 and on Government's Exhibit 480, on the bottom where it has in  
11 cursive, 3 Percent, to redact that, in an abundance of caution,  
12 because it could be unfairly prejudicial, since you are not  
13 seeking to admit any evidence that he was a member --

14 MR. DICKINSON: Okay.

15 THE COURT: -- or joined up with a group called the 3  
16 Percenters, but merely what your intent is to demonstrate that  
17 he has not disavowed and that he continues to . . . the conduct  
18 of the conspiracy. I think that's -- that's the best way to go  
19 about it.

20 MR. DICKINSON: We will do that, Your Honor.

21 THE COURT: So I think the defendant's motion is  
22 granted in part, denied in part.

23 Anything else?

24 MR. LEVENTHAL: Your Honor, I just would have an  
25 issue on 4 -- I haven't seen these. This is the first time.

1 There's 476 that has a picture of what I assume to be  
2 Mr. Parker, Mr. Drexler, and somebody in the middle that I  
3 don't recognize or know and I -- I don't -- all it says is  
4 "Eric EJ Parker, July 12th, 2015." I don't know where this is  
5 from. My client is on this picture and, you know, the  
6 prejudicial effect, but more so than that one, not only the  
7 authenticity of whatever that picture is, more so is 477 that  
8 has something to do with -- I have no idea what it means, "In  
9 the hallowed halls of Valhalla, where the brave shall live  
10 forever" and has a picture of my client. Clearly he had  
11 nothing do with that. It's a picture of him. It doesn't even  
12 show what Facebook this is on, who wrote that, who said that,  
13 and I think the prejudicial effect on my client, who did not  
14 take the stand as of yet, that should not come in. It's too --  
15 it's overly prejudicial and it's -- there's zero probative  
16 value to it whatsoever and I don't see how that's even relevant  
17 to my client. Whether or not that was on Mr. Parker's website,  
18 I don't know how that has to do with Mr. Drexler and what was  
19 written underneath it. I understand that they're claiming  
20 there's a conspiracy, but all of this stuff could have come in  
21 in their case-in-chief. Now, all of a sudden, Mr. Parker takes  
22 the stand and now my client is the spillover and the  
23 prejudicial effect because Mr. Parker chose to take the stand.  
24 So if it does come in, it only comes in, I guess, for  
25 Mr. Parker and not for Mr. Drexler, but I would ask that at

1 least these two pictures do not come in as having zero  
2 relevancy to what Mr. Parker testified on the stand in our  
3 case.

4 They could have done it in their case; they chose not  
5 to.

6 THE COURT: Well, if they could have done it in their  
7 case, then there's no prejudice to it coming in on cross. I  
8 think the question really is the relevance. 476 is the photo  
9 of -- is that . . . Drexler's?

10 MR. DICKINSON: 476 is a picture of Mr. Parker and  
11 Mr. Drexler with another individual. They're, you know, taking  
12 the picture. It's clearly on the bridge on the 12th. It's  
13 from Mr. Parker's Facebook page. He posted it a year later on  
14 July 12th, 2015. Mr. Parker is smiling, which, again, goes  
15 against his direct testimony of how upset he was on the bridge,  
16 that his interview with Mr. Flynn was just him being cocky.

17 The other one, November 12th, 2015, Mr. Parker  
18 is writing -- he posts a picture -- and this is Government  
19 477 -- November 20th, 2015 -- now we're a year and a half  
20 later, "Our ongoing weekly tribute to the men and women who  
21 showed up that day and were not me." And it's a picture of  
22 Mr. Drexler on the bridge and on the picture it's written, "Lo,  
23 do they call to me, they bid me to take my place among them, in  
24 the hallowed halls of Valhalla, where the brave shall live  
25 forever."

1           So it's, once again, Mr. Parker glorifying the  
2       conspiracy. He posted multiple of these on a weekly basis of  
3       other people that were there besides him. And it's not overly  
4       prejudicial; it's a conspiracy. He traveled there with  
5       Mr. Drexler.

6           THE COURT: All right. Well, it appears both 476 and  
7       477, 476 is photograph from -- taken on the date of the event,  
8       477 posted after the event, but an ongoing tribute to those  
9       members of the conspiracy who were participating in the event.  
10      So that would seem to be relevant.

11          MR. LEVENTHAL: I still don't see how we get over the  
12      authenticity stage of this. We've had -- we've had an FBI  
13      agent -- I mean, we've had not a lot of authenticity, I get it,  
14      but how -- I mean, we had an FBI agent that came in that said  
15      that as of yesterday, she saw this on his website. How do we  
16      even get here, now, where it just has a picture with some  
17      stuff? How, over the weekend, do we get here (indicating)? I  
18      mean, this was clearly --

19          THE COURT: So your objection is as to foundation it  
20      sounds like.

21          MR. LEVENTHAL: I'm going to go foundation, I'm going  
22      to say relevancy, I'm going to say prejudicial. I mean, I  
23      don't even know how we get here after the fact, just because he  
24      decided to take the stand.

25          THE COURT: Okay. Well, that will be something



1 Mr. Dickinson will have to figure out.

2 Let's talk about the prejudice. What is the argument  
3 for prejudice?

4 MR. LEVENTHAL: Well, clearly my client had -- I  
5 understand that there's a picture here. I don't know who took  
6 it and I don't even know what "Valhalla, where the brave  
7 shall" -- what is the relevance of what Valhalla and where the  
8 brave shall live forever? I don't know what it means, but  
9 it -- I -- I don't -- the prejudicial effect and the spillover  
10 effect on my client with his picture sitting there, that has no  
11 authenticity to, is clearly just designed to do that. It's  
12 clearly designed just so that -- and, you know, I understand  
13 that they're saying the conspiracy, but it's designed just to  
14 prejudice, not only Mr. Parker, but now bring in my client for  
15 some reason that he had nothing to do with. If they brought  
16 in -- they brought in his Facebooks [sic]. They brought in his  
17 posts. They showed, I think, we got two pages of Mr. Drexler's  
18 posts. What other people post about him or a picture with him  
19 with a saying, I think it's not relevant.

20 THE COURT: Can I see Exhibit 477?

21 MR. DICKINSON: Yes, Your Honor.

22 (Brief pause in proceedings.)

23 THE COURT: And, Mr. Dickinson, is 477 offered only  
24 as to Mr. Parker or evidence of the conspiracy?

25 MR. DICKINSON: Evidence of the ongoing conspiracy,

1 Your Honor. We already have something similar posted by  
2 Mr. Burleson about wanting to go to the halls of Valhalla that  
3 was -- that was introduced against everybody.

4 Mr. Parker took the stand and this goes contrary to  
5 his testimony of, well, I just sort of left on the 12th and it  
6 was all a big confusing thing and I didn't really know what was  
7 going on.

8 THE COURT: Okay. And I agree that it's clear on  
9 this exhibit that the post is from the Facebook page of Parker  
10 on November 20, 2015, and states that the ongoing -- "our  
11 ongoing weekly tribute to the men and women who showed up that  
12 day that were not me." So it does refer to the day. It  
13 appears to be a picture of that day, with a member that was  
14 present holding a rifle. As long as it's clear that the words  
15 that are underneath the picture are not to be -- I mean, I  
16 don't -- it's -- it's -- I guess you'll have to lay the  
17 foundation for where this came from, but -- it's obviously not  
18 offered for the truth of the matter asserted, that -- but  
19 rather to indicate the continuing . . .

20 MR. LEVENTHAL: But it is, Your Honor. The --  
21 clearly Mr. Dickinson just indicated that it's offered for the  
22 conspiracy, which is the truth of the matter asserted. So it's  
23 hearsay. It's inadmissible, and that's exactly what he said  
24 it's for, is to show the ongoing conspiracy. So it is being  
25 offered for the truth.

1 THE COURT: It's the agreement between two  
2 individuals, which is why I was thinking of redacting the --  
3 his face, but that wouldn't be appropriate because it's  
4 evidence of the conspiracy --

5 MR. LEVENTHAL: It's hearsay.

6 THE COURT: -- and the agreement and the  
7 continuing --

8 MR. DICKINSON: Correct, Your Honor.

9 THE COURT: -- participation in the conspiracy.

10 MR. DICKINSON: There's no hearsay. We're not  
11 offering the call to Valhalla.

12 And what Mr. Parker wrote on the weekly tribute is  
13 his own statement.

14 THE COURT: Yeah. I don't -- I don't see that  
15 there's any prejudice in 476 or 477 that outweighs its  
16 probative value. The foundational problem will be one that  
17 we'll have to cross when we get there.

18 MR. TANASI: Your Honor, if I may, just for the  
19 record, join in Mr. Leventhal's objection.

20 THE COURT: Yes.

21 MR. TANASI: Thank you. Stewart.

22 MR. LEVENTHAL: Are we going to have to now explain  
23 what Valhalla is? Because I don't know what Valhalla is until  
24 I was just told now, but I can imagine that the jury has no  
25 clue what "in the hallowed halls of Valhalla" means. Again,

1 that sounds to me like it's somewhat prejudicial, but I don't  
2 know what it is and if I don't know what it is, I can imagine  
3 that the jury is going to sit there, Is that some reference to  
4 some ISIS or Muslim calling? I have no idea what it is. And  
5 so, just to have it there it absolutely ridiculous. I think  
6 now we're getting into explaining what the "halls of Valhalla"  
7 mean.

8 MR. DICKINSON: It's already in evidence, Your Honor.

9 THE COURT: It's already -- yeah. It's already in  
10 evidence with Mr. Burleson's Facebook page.

11 MR. DICKINSON: It's not ICE -- it's not ISIS or  
12 terrorism. It's Norse mythology, but I'm sure the Court knows.

13 THE COURT: Right. And the fact that different  
14 individuals are using the same unique terminology is more  
15 evidence of conspiracy than not. So I -- I don't know -- is  
16 there a plan to explain what it is or . . .

17 MR. DICKINSON: I don't think I was really planning  
18 on having Mr. --

19 THE COURT: Yeah. That would make it --

20 MR. DICKINSON: It's from a movie as well, a movie  
21 called *The 13th Warrior*, but I wasn't planing on taking up the  
22 Court's time.

23 THE COURT: Yeah.

24 Mr. Marchese.

25 MR. MARCHESE: I had another issue, so I was just

1 waiting for this to be over.

2 THE COURT: Okay. Go ahead.

3 MR. MARCHESE: It's also -- I've received a new  
4 exhibit today, Government's Exhibit 435. It believe it to be a  
5 portion of a 302 from a Gregory Johnson, one of the BLM agents  
6 that testified earlier during the Government's case-in-chief.  
7 I don't know what the relevant -- well, I know what the  
8 relevance or what the -- at least what they're trying to get  
9 at, but in looking at it, if they're going to plan to elicit  
10 this testimony or bring in this exhibit, I'm going to just  
11 lodge a hearsay objection from the start on that.

12 MR. DICKINSON: Your Honor, this was already  
13 admitted. It was admitted under Rule 611 when Mr. Marchese  
14 impeached Mr. Johnson. Sort of didn't realize that he actually  
15 had that in his 302, so we put it in under that rule and the  
16 Court admitted it, as long as we redacted it. We were just  
17 catching up on everything.

18 MR. MARCHESE: Okay.

19 MR. DICKINSON: We didn't get around -- a chance to  
20 get around to redacting it. So, if Mr. Marchese has a problem  
21 with the redaction, we're happy to try to work that out.

22 MR. MARCHESE: No. That's fine. I just didn't -- it  
23 was so long ago, I don't even remember. Plus, I think there's  
24 another Ranger Johnson so, sometimes I get the two mixed up.

25 MR. DICKINSON: My bad. It just took me awhile to

1 get that off my list, Your Honor, so . . .

2 THE COURT: Okay. All right. Anything else?

3 Let's go ahead and call in the jury.

4 MR. DICKINSON: Do we need Mr. Parker on the stand,  
5 Your Honor?

6 THE COURT: Yes.

7 Mr. Parker, come on up and take the stand.

8 I can see the top of the water bottle, but I can't  
9 tell -- it's full, right? Okay. It's not the empty one from  
10 yesterday?

11 Okay. Go ahead.

12 (Brief pause in proceedings.)

13 THE COURT: And Mr. Dickinson, Mr. Parker, try not to  
14 speak over each other today.

15 MR. DICKINSON: Yes, Your Honor.

16 THE WITNESS: Yes, Your Honor.

17 (Brief pause in proceedings.)

18 COURTROOM ADMINISTRATOR: All rise.

19 (Jury returned to courtroom at 9:05 a.m.)

20 THE COURT: All right. Everyone may be seated.

21 Good morning. We're joined by the jury, and we have  
22 Mr. Parker back on the stand.

23 Mr. Dickinson, you may continue with your  
24 cross-examination.

25 MR. DICKINSON: Do you want the parties to make their

1 appearances, Your Honor?

2 THE COURT: I think the jury probably knows who  
3 everybody is by now. If you want to -- if you want to make  
4 your appearances, I'd be happy to allow you to keep doing that.

5 MR. DICKINSON: It's what we've normally been doing.  
6 I didn't want to --

7 THE COURT: Yeah. Go ahead. Government can make its  
8 appearance and we'll let the defense make its appearance.

9 MR. DICKINSON: Good morning.

10 Nicholas Dickinson, Steven Myhre, Erin Creegan, and  
11 Nadia Ahmed for the United States.

12 MR. TANASI: Thank you, Your Honor.

13 Good morning, folks. Rich Tanasi for Steven Stewart.  
14 Also with us at counsel table is Gwen Wilson and Bryan Ginn.

15 Thank you.

16 MR. MARCHESE: Good morning, everyone.

17 Jess Marchese on behalf of Eric Parker.

18 MR. LEVENTHAL: Good morning, everyone.

19 Todd Leventhal on behalf of Mr. Drexler.

20 MR. GEORGE: Good morning.

21 John George on behalf of Todd Engel.

22 MR. PEREZ: Good morning, everybody.

23 Shawn Perez on behalf of Ricky Lovelien.

24 MR. JACKSON: Good morning, everyone.

25 Terrence Jackson for Greg Burleson and also with me

1 is Christine Abbott.

2 THE COURT: Good morning, everybody. Thank you.

3 Go ahead.

4 MR. DICKINSON: Thank you.

5

6 FURTHER CROSS-EXAMINATION OF ERIC PARKER

7 BY MR. DICKINSON:

8 Q. Good morning, Mr. Parker.

9 A. Good morning.

10 Q. I want to start discussing your time on the northbound  
11 bridge on April 12th, 2014. Okay?

12 A. Yep.

13 MR. DICKINSON: If we could bring up 457-16.

14 (Government Exhibit 457-16 published.)

15 MR. DICKINSON: I apologize. 457-19.

16 Well, let's keep it here.

17 BY MR. DICKINSON:

18 Q. This was before you got onto the northbound bridge;  
19 correct?

20 THE COURT: Just -- this -- when you say "this," we  
21 are looking at Exhibit 457 --

22 BY MR. DICKINSON:

23 Q. This picture, this is you (indicating); correct?

24 THE COURT: -- 16.

25 THE WITNESS: Yes, sir.



1 BY MR. DICKINSON:

2 Q. And this is before you got onto the northbound bridge?

3 A. Yes, it is, sir.

4 Q. And are you holding your -- you're holding your firearm in  
5 this picture?

6 A. I am.

7 Q. And you're wearing your vest with plates?

8 A. I am.

9 Q. And you're wearing your black hat with the white insignia?

10 A. Yes, sir.

11 MR. DICKINSON: If we could go to 457-19.

12 (Government Exhibit 457-19 published.)

13 BY MR. DICKINSON:

14 Q. That's you (indicating)?

15 A. It is, sir.

16 Q. And you're walking onto the northbound bridge?

17 A. I am.

18 Q. And you're holding your weapon?

19 A. Yes, sir.

20 Q. And you're wearing your vest with plates?

21 A. Yes, sir.

22 Q. And you're wearing a black hat with the white insignia?

23 A. I am, sir.

24 Q. And that's Mr. Engel (indicating)?

25 A. It appears to be, sir, yes.

1 Q. And he has his weapon?

2 A. Yes, sir.

3 Q. And he appears to be looking at his phone or taking a  
4 picture?

5 A. That's what it looks like, sir.

6 MR. DICKINSON: If we could play Government's Exhibit  
7 76, starting at about 35 seconds.

8 (Government Exhibit 76 published.)

9 BY MR. DICKINSON:

10 Q. That gentleman just yelled, "Your court order does not  
11 apply"; correct?

12 A. I believe he was talking about the highway, sir.

13 Q. My question is, that gentlemen just yelled, "Your court  
14 order does not apply"; correct?

15 A. Yes, sir.

16 MR. DICKINSON: Continue to play.

17 (Government Exhibit 76 published.)

18 MR. DICKINSON: If we could move to Government  
19 Exhibit 77 and play it from the beginning.

20 (Government Exhibit 77 published.)

21 MR. DICKINSON: If we could pause it.

22 BY MR. DICKINSON:

23 Q. At 16 seconds, these are the horses that are now coming  
24 under the northbound bridge; correct?

25 A. Yes, sir.

1 Q. The same horses that you saw up at the rally area earlier  
2 that day?

3 A. I believe so, sir.

4 Q. Same flags?

5 A. I believe so, sir. Yeah.

6 MR. DICKINSON: Continue to play.

7 (Government Exhibit 77 published.)

8 MR. DICKINSON: Pause it.

9 BY MR. DICKINSON:

10 Q. Now, the horses have -- some of the horses have made their  
11 way through under the northbound bridge; correct?

12 A. Yes, sir.

13 Q. And they're continuing to move forward; correct?

14 A. Yes, sir, to the center of the wash there.

15 MR. DICKINSON: Play it.

16 (Government Exhibit 77 published.)

17 MR. DICKINSON: Go back a little bit. Go back to,  
18 like, 1:05.

19 (Government Exhibit 77 published.)

20 BY MR. DICKINSON:

21 Q. Appear to see people waving people into the wash?

22 A. Yeah. Yeah, I think that's what was -- yes, sir.

23 Q. And the people are moving up with the horses to the middle  
24 of the wash; correct?

25 A. Yes, sir.

1 MR. DICKINSON: Keep playing.

2 (Government Exhibit 77 published.)

3 MR. DICKINSON: Stop at 2:22.

4 BY MR. DICKINSON:

5 Q. We're pausing this at 2:22.

6 Do you see that, Mr. Parker?

7 A. See what, sir?

8 Q. Do you see what's on the screen if we pause it at 2:22?

9 A. Yes, sir.

10 MR. DICKINSON: If we could bring up Government's  
11 Exhibit 472 just for the Court and parties and Mr. Parker.

12 (Government Exhibit 472 published to witness.)

13 BY MR. DICKINSON:

14 Q. Mr. Parker, does this appear to be a screenshot of what we  
15 just saw at 2:22?

16 A. Yes, sir.

17 MR. DICKINSON: I'd move for the admission of  
18 Government's Exhibit 472.

19 THE COURT: Any objection?

20 MR. MARCHESE: No objection Parker.

21 THE COURT: 472 will be admitted.

22 (Government Exhibit 472 received.)

23 MR. DICKINSON: Permission to publish?

24 THE COURT: Yes.

25 (Government Exhibit 472 published.)

1 BY MR. DICKINSON:

2 Q. So now, at this time in the wash, Mr. Parker, the  
3 horses -- you see horses; correct?

4 A. Yes, sir.

5 Q. Horses.

6 And you see people; correct?

7 A. Yes, sir.

8 Q. And they've moved up into the middle of the wash; correct?

9 A. Yes, sir.

10 Q. And the law enforcement officers are on the other side of  
11 the gate; correct?

12 A. Yes.

13 Q. And nobody from over here (indicating) has moved up to the  
14 gate; correct?

15 A. No, sir.

16 MR. DICKINSON: If we could go forward. 473. If we  
17 could go forward back -- if we could go back to 77. And stop  
18 it at 2:24.

19 (Government Exhibit 77 published.)

20 BY MR. DICKINSON:

21 Q. And you see now what we've stopped here at 2:24?

22 A. Yes, sir.

23 MR. DICKINSON: And if we could bring up 473 for the  
24 witness and the parties.

25 (Government Exhibit 473 published to witness.)

1 BY MR. DICKINSON:

2 Q. Mr. Parker, does this appear to be a screenshot of what  
3 you just saw stopped at 2:24?

4 A. Yes, sir.

5 MR. DICKINSON: Move for the admission of Government  
6 473.

7 THE COURT: Any objection to 473?

8 MR. MARCHESE: No objection Parker.

9 THE COURT: All right. 473 will be admitted.

10 (Government Exhibit 473 received.)

11 MR. DICKINSON: Permission to publish?

12 THE COURT: Yes, you may.

13 BY MR. DICKINSON:

14 Q. And this is just a few seconds later, Mr. Parker, and  
15 there's no one in this area (indicating) between the people on  
16 the horses and the law enforcement; correct?

17 A. No -- no, sir.

18 Q. And do you see this individual down here (indicating)?

19 A. Yes. I do now.

20 Q. And he has a gun?

21 A. It appears that way, yes, sir.

22 MR. DICKINSON: And if we could go back to and  
23 continue to play 77 and stop it at 2:27.

24 (Government Exhibit 77 published.)

25 ///

1 BY MR. DICKINSON:

2 Q. Do you see what we see here on the screen, Mr. Parker,  
3 where it's paused at 2:27 on the Exhibit 77?

4 A. Yes, sir.

5 MR. DICKINSON: If we could bring up Exhibit 474 for  
6 the Court and Mr. Parker and the parties.

7 (Government Exhibit 474 published to witness.)

8 BY MR. DICKINSON:

9 Q. Does this appear to be a screenshot from 2:27 of what we  
10 were just looking at?

11 A. Yes, sir.

12 MR. DICKINSON: Government moves for the admission of  
13 Government's Exhibit 474.

14 THE COURT: Any objection?

15 MR. LEVENTHAL: No, Your Honor.

16 MR. MARCHESE: No, Your Honor.

17 MR. TANASI: None from Stewart, Your Honor.

18 THE COURT: 474 will be admitted.

19 (Government Exhibit 474 received.)

20 THE COURT: You may publish.

21 (Government Exhibit 474 published.)

22 BY MR. DICKINSON:

23 Q. Mr. Parker, this individual (indicating) is dressed in a  
24 tan uniform; correct?

25 A. Yes, sir.

1 Q. Appears to have a patch on his shoulder; correct?

2 A. I -- I can't tell that, but yes, I see he's in a tan . . .

3 Q. This individual (indicating) is in a tan uniform; correct?

4 A. Yes, sir.

5 Q. Tan hat?

6 A. Brown, but yeah.

7 Q. Brown hat?

8 A. Yes, sir.

9 Q. This individual (indicating), same, brown hat?

10 A. Yes, sir.

11 Q. Same with this individual right here (indicating)?

12 A. Yeah. Some sort of boonie cap or brimmed.

13 Q. And you see "ranger" written on this truck right there  
14 (indicating)?

15 A. I do now, sir, yes.

16 Q. And you see "ranger" written on this right here  
17 (indicating) with a badge?

18 A. Yes. Yes, sir.

19 Q. And the people here in the green (indicating), they're in  
20 between these two ranger vehicles; correct?

21 A. The ones pointing guns at people, sir?

22 Q. These people in the green, they're standing in between two  
23 ranger vehicles; correct?

24 A. Yes, sir.

25 Q. And at this time you're on the northbound bridge; correct?



1 A. Yeah. About 150 yards away, sir.

2 Q. My answer [sic] was you're on the northbound bridge. Is  
3 that a yes?

4 A. I answered it.

5 Q. And you have your firearm, your long gun; correct?

6 A. Yes, sir.

7 Q. And you're wearing your vest with your plates, right?

8 A. Yes, sir.

9 Q. You're wearing your black hat with the white emblem;  
10 correct?

11 A. Yes, sir.

12 Q. And each of these trucks, that's a light bar (indicating)  
13 on top of that truck; correct?

14 A. Yes, sir.

15 Q. And that's a light bar (indicating) on top truck of that  
16 truck; correct?

17 A. Yes, sir.

18 Q. And that's a light bar (indicating) on top of that truck;  
19 correct?

20 A. Yes, sir.

21 Q. So when you were standing on that bridge, you knew there  
22 were BLM officers in the wash; correct?

23 A. I didn't say that, sir.

24 Q. You didn't know there were BLM officers in the wash?

25 A. No. I -- I never said that, sir.

1 MR. DICKINSON: If we could go back to 77 and  
2 continue playing.

3 (Government Exhibit 77 published.)

4 MR. DICKINSON: Pause it.

5 BY MR. DICKINSON:

6 Q. Now, the crowd is yelling, "Open that gate"?

7 A. It would appear so, sir, yes.

8 Q. Is that a yes?

9 A. Yes. Yes, sir.

10 MR. DICKINSON: Continue playing.

11 (Government Exhibit 77 published.)

12 BY MR. DICKINSON:

13 Q. Now, the crowd was yelling, "Open that gate." When you  
14 were on the northbound bridge, you were on for a while;  
15 correct?

16 A. Yeah. Yes, sir.

17 Q. And you heard the BLM make announcements to disperse?

18 A. Yeah. That's fair enough, yes.

19 Q. And you heard BLM make announcements referencing court  
20 orders; correct?

21 A. Yeah. Yes, sir.

22 Q. All right.

23 MR. DICKINSON: If we could go to Government's  
24 Exhibit 472.

25 Oh, I'm sorry. We've already -- I apologize. If we

1 could go to 365 and publish.

2 (Government Exhibit 365 published.)

3 MR. DICKINSON: Pause it. Pause it.

4 If we could go back, Nicole, to blue shirt.

5 (Government Exhibit 365 published.)

6 BY MR. DICKINSON:

7 Q. The gentleman in the blue shirt is holding a long gun;  
8 correct?

9 A. Yes, sir.

10 Q. Same individual we saw before with a long gun; correct?

11 A. Yes, sir.

12 MR. DICKINSON: Can you continue playing.

13 (Government Exhibit 365 published.)

14 MR. DICKINSON: Pause it.

15 BY MR. DICKINSON:

16 Q. The gentleman in the red shirt (indicating), long gun;  
17 correct?

18 A. Yeah -- yes, sir.

19 MR. DICKINSON: Continue playing.

20 (Government Exhibit 365 published.)

21 MR. DICKINSON: Pause it. Pause it.

22 What's the time? 28 seconds.

23 BY MR. DICKINSON:

24 Q. That (indicating) appears to be an underage girl; correct?

25 A. I can't tell how old she is. I don't know what you mean

1 by "underage," I guess, sir.

2 Q. A child?

3 A. Yeah. I could guess that. Children.

4 MR. DICKINSON: Continue to play.

5 (Government Exhibit 365 published.)

6 MR. DICKINSON: If you could pause it.

7 Time, please?

8 55 seconds.

9 BY MR. DICKINSON:

10 Q. Do you see that individual (indicating) in the desert  
11 fatigues?

12 A. Yes -- yes, sir.

13 MR. DICKINSON: Continue to play.

14 (Government Exhibit 365 published.)

15 MR. DICKINSON: Go back just a little bit, Nicole.

16 If we could go back just a few seconds. I apologize.

17 A little bit more. A little bit more.

18 You can play it there and then stop it.

19 (Government Exhibit 365 published.)

20 MR. DICKINSON: Do you see that -- can you just bring  
21 it back -- keep playing.

22 If you could go back like 10 seconds. I apologize.

23 If you can pause it there. Perfect.

24 BY MR. DICKINSON:

25 Q. Do you see these two individuals (indicating) in desert

1     fatigues, this one (indicating) and this one (indicating)?

2     A.    Yes, sir, I do now.

3     Q.    This one appears to have -- this one does have a long gun?

4     A.    Looks like it, sir, yes.

5                 MR. DICKINSON: Continue to play.

6                 (Government Exhibit 365 published.)

7     BY MR. DICKINSON:

8     Q.    At the end of this (indicating), the horses and the people  
9     are still in the line; correct?

10    A.    Yes, sir.

11    Q.    And these two people (indicating) have moved forward;  
12    correct?

13    A.    It would appear so, sir.

14    Q.    And you're still on the northbound bridge?

15    A.    Yes, sir.

16    Q.    With your weapon?

17    A.    Yes, sir.

18    Q.    And your black vest with the plates?

19    A.    Yes, sir.

20    Q.    And your black hat with the white insignia?

21    A.    Yes, sir.

22    Q.    And at this point no one's been shot?

23    A.    No, sir.

24    Q.    And no one's been gassed?

25    A.    No, sir.

1 MR. DICKINSON: If we could go to 457-32.

2 (Government Exhibit 457-32 published.)

3 BY MR. DICKINSON:

4 Q. Here's a person (indicating) wear -- in a prone position;  
5 correct?

6 A. Yes -- yes, sir. He's laying down.

7 Q. He's wearing desert fatigues?

8 A. Some sort of camouflage, yes. Yes, sir.

9 Q. You can see the end of a long gun right there  
10 (indicating)?

11 A. I do, sir.

12 Q. And he's facing towards the law enforcement officers;  
13 correct?

14 A. He's looking in that direction, yes, sir.

15 Q. And he's under the northbound bridge; correct?

16 A. Yes, sir.

17 MR. DICKINSON: If we could go to 457-36.

18 (Government Exhibit 457-36 published.)

19 BY MR. DICKINSON:

20 Q. That's Greg Burleson in the wash (indicating); correct?

21 A. Yes, sir.

22 Q. He has a long gun?

23 A. Yes, sir.

24 Q. There's someone next to him wearing desert fatigues?

25 A. Yes, sir.

1 Q. And he has a long gun; correct?

2 A. Yes, sir.

3 MR. DICKINSON: If we could go to 46.

4 (Government Exhibit 46 published.)

5 BY MR. DICKINSON:

6 Q. That's you, Mr. Parker (indicating)?

7 A. Yes, it is, sir.

8 Q. On the northbound bridge?

9 A. Yes, sir.

10 Q. Appear to be kneeling?

11 A. I do.

12 Q. And you can see the top, the butt of your long gun right  
13 there (indicating)?

14 A. Yes, sir.

15 Q. And your black hat with the white insignia?

16 A. Yes, sir.

17 MR. DICKINSON: If we could go to the next slide,  
18 457-47.

19 BY MR. DICKINSON:

20 Q. We'll start with this. This person, (indicating) sitting  
21 under the northbound bridge? This person sitting under the  
22 northbound bridge that I circled?

23 A. Are you asking if I can see him or --

24 Q. Can you see him -- in this picture he's sitting under the  
25 northbound bridge.

1 A. Yes, sir.

2 Q. He's wearing desert fatigues?

3 A. Yes, sir. Some sort of camouflage.

4 Q. You can see the end of a long gun (indicating); correct?

5 A. I -- I can't say that that's what that is, but I'll take  
6 your word for it.

7 Q. He's facing towards the law enforcement on the other side  
8 of the gate; correct?

9 A. Yeah. He's looking in that direction, sir.

10 Q. This individual (indicating), sitting under the northbound  
11 bridge?

12 A. Yes, sir.

13 Q. Wearing desert fatigue?

14 A. Yes, sir. Some sort of camouflage, sir.

15 Q. And looking in the same way towards law enforcement  
16 officers?

17 A. He kind of looks like he's looking at the crowd a little  
18 more to me, sir, but I'll take your word for it.

19 MR. DICKINSON: If we could go to 457-48.

20 (Government Exhibit 457-48 published.)

21 BY MR. DICKINSON:

22 Q. Again, this is you; correct?

23 A. Yes, sir.

24 Q. On the northbound bridge?

25 A. Yes, sir.



1 Q. It's a little blurry, but can you tell -- can you see your  
2 long gun here?

3 A. You can see the butt of it.

4 Q. And we can see your hat with the white insignia?

5 A. It's a little blurry, but yes, sir, I am wearing a black  
6 hat with a white insignia.

7 MR. DICKINSON: Could I have one second, Your Honor?

8 THE COURT: Yes.

9 (Counsel conferring.)

10 MR. DICKINSON: Thank you, Your Honor.

11 BY MR. DICKINSON:

12 Q. Now, at some point, Mr. Parker, did you see a man, from  
13 the other side of the gate where the law enforcement was,  
14 approach the gate wearing a vest that said "police"?

15 A. I saw a few people approach the gate, sir.

16 Q. Specifically, did you see a man approach the gate with a  
17 vest that said "police"?

18 A. No, sir.

19 Q. You did not see that?

20 A. I did not see his vest that said "police," sir.

21 MR. DICKINSON: If we could go to 457-53.

22 (Government Exhibit 457-53 published.)

23 BY MR. DICKINSON:

24 Q. And this is you, Mr. Parker; correct?

25 A. Yes, sir.

1 Q. And now you're standing up?

2 A. Yes, sir.

3 Q. And your weapon, your long gun's visible?

4 A. Yes, sir.

5 Q. Above the barrier?

6 A. Yes, sir.

7 Q. You're wearing your black vest with the plates; correct?

8 A. Yes, sir.

9 Q. And your white hat -- I mean, your black hat with the  
10 white insignia?

11 A. Yes, sir.

12 MR. DICKINSON: And if we could go to Defense Exhibit  
13 5020. Start with A.

14 (Defense Exhibit 5020A published.)

15 BY MR. DICKINSON:

16 Q. You testified about this exhibit on direct examination;  
17 correct, Mr. Parker?

18 A. Yes. I believe so, sir.

19 Q. And that's you (indicating)?

20 A. Yes, sir.

21 Q. And you're kneeling down; correct?

22 A. I am, sir.

23 Q. And in all these pictures you're wearing your black hat  
24 with the white insignia facing forward; correct?

25 A. I never changed, sir.

1 MR. DICKINSON: If we could go to B.

2 (Defense Exhibit 5020B published.)

3 BY MR. DICKINSON:

4 Q. Again, you're standing up here (indicating) and your long  
5 gun -- your weapon, long gun is visible?

6 A. Some of it, sir, yes.

7 Q. Some of it's visible above the barrier?

8 A. Yes, sir.

9 MR. DICKINSON: If we could go to the next slide, C.

10 (Defense Exhibit 5020C published.)

11 BY MR. DICKINSON:

12 Q. Same thing. Standing up (indicating)?

13 A. Yes, sir.

14 Q. And your long gun is visible above the barrier?

15 A. Yes, sir.

16 Q. On the northbound bridge?

17 A. Yes, sir.

18 MR. DICKINSON: If we could go to D.

19 (Defense Exhibit 5020D published.)

20 BY MR. DICKINSON:

21 Q. Same thing. Standing up, that's you (indicating)?

22 A. Yes, sir.

23 Q. You're standing up?

24 A. Yes, sir.

25 Q. And your gun is visible above the barrier?

1 A. Yes, sir.

2 Q. On the northbound bridge?

3 A. Yes, sir.

4 MR. DICKINSON: Is there E?

5 That's the last one. Okay.

6 BY MR. DICKINSON:

7 Q. Okay. Again, this is you, northbound bridge; correct?

8 A. Yes, sir.

9 Q. Standing up (indicating)?

10 A. Yes, sir.

11 Q. And your gun is visible?

12 A. Yes, sir.

13 Q. Now, you testified on direct about some of the things you  
14 heard the BLM make announcements on the loud speaker, but at  
15 some point you also heard the BLM say they were going to  
16 disperse gas or they were going to gas the crowd?

17 A. Yes. Chemicals I think they said, sir.

18 Q. So you thought -- you thought the BLM said they were going  
19 to use chemicals on the crowd?

20 A. Yes, sir.

21 Q. And was that before or after you thought they were going  
22 to shoot the crowd?

23 A. Before.

24 MR. DICKINSON: If we could go to 457, slide 54.

25 (Government Exhibit 457-54 published.)

1 BY MR. DICKINSON:

2 Q. Now, we see the crowd and the horses moving forward  
3 towards the gate (indicating); correct?

4 A. Yeah. Some of them, sir, yes.

5 MR. DICKINSON: And if we could go to 457-57.

6 (Government Exhibit 457-57 published.)

7 BY MR. DICKINSON:

8 Q. Now, we see a fair amount of people have moved up against  
9 the gate (indicating); correct?

10 A. Yes, sir.

11 Q. And horses (indicating)?

12 A. Yes, sir.

13 Q. And some of the horses are still back here (indicating);  
14 correct?

15 A. They are, sir.

16 Q. And Mr. Burleson's right there (indicating); correct?

17 MR. JACKSON: I'm going to object, Your Honor. He's  
18 asking for a conclusion he's not competent to make. He didn't  
19 know Mr. Burleson and he's just looking at an arrow that's  
20 pointed with Greg Burleson's name. I don't think this witness  
21 is competent to make that determination.

22 THE WITNESS: I can't see him anyway, sir.

23 THE COURT: Sustained.

24 MR. JACKSON: What?

25 THE WITNESS: I can't see him anyway, sir. He's --

1 whoever the arrow is pointing out, there's a guy with a white  
2 shirt there and then somebody behind --

3 THE COURT: Mr. Parker, there's no question. I  
4 sustained the objection.

5 THE WITNESS: Oh, sorry. Sorry, Your Honor.

6 BY MR. DICKINSON:

7 Q. And at this point you're still on the northbound bridge;  
8 correct?

9 A. Yes, sir.

10 Q. With your weapon?

11 A. Yes, sir.

12 Q. And your black vest with the plates?

13 A. Yes, sir.

14 Q. And your hat?

15 A. Yes, sir.

16 Q. And no one's been shot?

17 A. No, sir.

18 Q. And no one's been gassed?

19 A. No, sir.

20 MR. DICKINSON: If we could go to 457-60.

21 (Government Exhibit 457-60 published.)

22 BY MR. DICKINSON:

23 Q. This is you (indicating); correct?

24 A. Yes, sir.

25 Q. Proned out laying in a proned position on the northbound

1 bridge; correct?

2 A. Yes, sir.

3 Q. And your firearm is pointed through the gap (indicating);  
4 correct?

5 A. Yeah. It's placed in the gap, sir.

6 Q. Towards the law enforcement?

7 A. Yes, sir.

8 MR. DICKINSON: And could we go to 457-67.

9 (Government Exhibit 457-67 published.)

10 BY MR. DICKINSON:

11 Q. This is you (indicating), Mr. Parker; correct?

12 A. Yes, sir.

13 Q. On the northbound bridge?

14 A. Yes, sir.

15 Q. And you're lying in a prone position; correct?

16 A. Yes, sir.

17 Q. Your feet are over the yellow line (indicating); correct?

18 A. Yes, sir.

19 Q. You're wearing your black vest with the plates; correct?

20 A. Yes, sir.

21 Q. You're wearing your hat forward with the white insignia;  
22 correct?

23 A. Yes, sir.

24 Q. Your left hand is underneath your right elbow  
25 (indicating); correct?

1 A. Yes, sir.

2 Q. Providing you support; correct? From the concrete?

3 A. The concrete -- the gravel was rough. I don't -- it was  
4 more of a smooth spot to put my elbow, sir.

5 Q. You've got your cheek up against your long gun  
6 (indicating); correct?

7 A. It's more my ear. I'm kind of -- I was looking at the  
8 lady, talking to her, the reporter.

9 Q. You were looking forward through your iron sights;  
10 correct?

11 A. No, sir.

12 Q. You're not looking forward through your iron sites here?

13 A. No. I'm not trying to argue with you, sir. I was looking  
14 over at the ground. I had just got done talking to the  
15 reporter, as I recall, sir.

16 Q. And your finger's here (indicating), right by the trigger;  
17 correct?

18 A. Above on the frame of the rifle, sir?

19 Q. Correct.

20 A. Yes.

21 Q. You can see it right there, not on the trigger, but it's  
22 right by the trigger; correct?

23 A. Yes, sir.

24 Q. And the barrel of your gun is in the gap; correct?

25 A. Yes, sir.



1 Q. Towards the BLM and law enforcement agents on the other  
2 side of the gate; correct?

3 A. They were in that direction, sir, yes.

4 Q. So at this point on the bridge, you're no longer confused;  
5 correct?

6 A. Oh, I'm still very confused, sir.

7 Q. You're still very confused right here?

8 A. As far as who is over there threatening to shoot women and  
9 children, sir, yes.

10 MR. DICKINSON: Can we go to 457-71.

11 (Government Exhibit 457-71 published.)

12 BY MR. DICKINSON:

13 Q. Again, you're in the same position; correct?

14 A. Yes, sir.

15 Q. Proned out on the freeway; correct?

16 A. Yes, sir.

17 Q. Your hat's facing forward?

18 A. It is.

19 Q. And your long gun is through the gap; correct?

20 A. Yes, sir.

21 Q. Towards the BLM officers on the other side?

22 A. Yes. They were in that direction, sir.

23 Q. Did you have any idea who that person (indicating) was?

24 A. I did not.

25 Q. And he has a long gun; correct?

1 A. Yeah. It looks like it, sir.

2 MR. DICKINSON: If we could go to 121.

3 (Government Exhibit 121 published.)

4 BY MR. DICKINSON:

5 Q. Again, same position; correct? Proned out on the freeway?

6 A. Yes, sir.

7 Q. Your hat's forward; correct?

8 A. It is, sir.

9 Q. And your long gun is through the Jersey barrier, the gap  
10 here; correct?

11 A. It -- it's - it's resting in the -- in the Jersey barrier.  
12 It's not through. There was -- it wasn't protruding through.  
13 I just want to be clear.

14 Q. It's in the gap; correct?

15 A. It's setting in the first section of that gap, yes, sir,  
16 about four inches.

17 Q. Towards the law enforcement on the other side of the gate;  
18 correct?

19 A. They are in that direction, sir, yes.

20 MR. DICKINSON: 457-74.

21 (Government Exhibit 457-74 published.)

22 BY MR. DICKINSON:

23 Q. Now, you're in a different position here; correct?

24 A. No. Not --

25 Q. Well, you're still in a proned position on the bridge;

1 correct?

2 A. I'm still laying on the bridge, sir, yes.

3 Q. But now, your left elbow -- your left hand is not under  
4 your right elbow here; correct?

5 A. Yeah. No. It's not, sir.

6 Q. Your right elbow is resting on a backpack; correct?

7 A. Yes, sir.

8 Q. Mr. Stewart's backpack; correct?

9 A. It's my backpack actually, sir.

10 MR. DICKINSON: Can we go back to -- Mr. Stewart  
11 brought you the backpack; correct?

12 THE WITNESS: He -- I asked for it and he brought it  
13 over. He was -- he went to go get water and my backpack.

14 BY MR. DICKINSON:

15 Q. So, when he went to go get water, you asked him to bring  
16 your backpack?

17 A. Water was in the backpack, sir.

18 Q. But now, you're using the backpack to rest your right  
19 elbow; correct?

20 A. Yes. I asked him for my backpack, sir.

21 Q. And now, your hat is backwards; correct?

22 A. Yes, sir.

23 Q. So, you moved positions from before; correct?

24 A. Yeah. Yes, sir. I --

25 MR. DICKINSON: If we could go to 79.

1 (Government Exhibit 79 published.)

2 BY MR. DICKINSON:

3 Q. That's you (indicating) down there; correct?

4 A. Yes, sir.

5 Q. Still laying on the freeway; correct?

6 A. Yes, sir.

7 Q. Your gun is still facing this way (indicating); correct?

8 A. Yes, sir.

9 Q. And it appears you're looking down towards where  
10 Mr. Stewart and Mr. Drexler are; correct?

11 A. Yes, sir. It appears that way.

12 Q. And Mr. Stewart is carrying his long gun; correct?

13 A. Yes, sir.

14 Q. And it's above the Jersey barrier; correct?

15 A. Yes, sir. Most of it.

16 Q. Now, at a certain point you get out of this position and  
17 you stand up and don't get back down into a prone position;  
18 correct?

19 A. Yes, sir.

20 MR. DICKINSON: If we could bring up Exhibit 84.

21 (Government Exhibit 84 published.)

22 MR. DICKINSON: Stop it, please.

23 Can we get a time?

24 BY MR. DICKINSON:

25 Q. So at 12 seconds, these people (indicating) on the

1 northbound bridge are hanging this sign; correct?

2 A. Yes, sir.

3 Q. And the sign says "The West Has Now Been Won"; correct?

4 A. That's what it looks like, sir.

5 MR. DICKINSON: Continue playing.

6 (Government Exhibit 84 published.)

7 MR. DICKINSON: Pause it.

8 BY MR. DICKINSON:

9 Q. That's you (indicating); correct?

10 A. Yes, sir.

11 Q. And Mr. Lovelien (indicating); correct?

12 A. Yeah. It looks like it, sir.

13 Q. Mr. Drexler (indicating)?

14 A. Yes. It looks like it, sir.

15 Q. Mr. Stewart (indicating)?

16 A. Yes, sir.

17 Q. And now you're up out of the prone position; correct?

18 A. Yes, sir.

19 Q. And that's because the officers -- the most -- the BLM  
20 officers that were closest to the gate had backed up; correct?

21 A. I -- I believe so, yes. At that time they had moved back  
22 to the other officers at the second group.

23 MR. DICKINSON: If we could go to Exhibit 238.

24 (Government Exhibit 238 published.)

25 MR. DICKINSON: Bring up from here (indicating) down,

1 Nicole.

2 BY MR. DICKINSON:

3 Q. This is your Facebook page; correct?

4 A. Yes, sir. Like I said, the warrant return kind of --  
5 confuses me.

6 Q. This is your Facebook page; right?

7 A. Well, it's a bunch of words on it. It confuses me the --  
8 yes, I -- it's a warrant return, I guess.

9 Q. 4 -- this is 4-12-2014; correct?

10 A. Yes, sir.

11 Q. At 11 o'clock. And someone is -- this person is sending  
12 you a message that said, "Feds got scared when you got there  
13 and backed off? LOL"; correct?

14 A. Yes, sir.

15 Q. You reply, you, with a thumbs up; correct?

16 A. Yes.

17 Q. Later on that day.

18 MR. DICKINSON: If we could go down to the bottom,  
19 Nicole.

20 BY MR. DICKINSON:

21 Q. And then you send another message to this person saying,  
22 "It took a standoff"; correct?

23 A. Yes, sir.

24 MR. DICKINSON: If we could go to Exhibit 246.

25 COURTROOM ADMINISTRATOR: What was that number?

1 MR. DICKINSON: Exhibit 246.

2 (Government Exhibit 246 published.)

3 BY MR. DICKINSON:

4 Q. This is you writing a message to this person (indicating);  
5 correct?

6 A. Yeah. Answering his -- yes, sir.

7 Q. Up here he asked you, "Any news? All my live feeds are  
8 F'd up"; correct?

9 A. Yes, sir.

10 Q. And you reply back, "It's over. We won"; correct?

11 A. Yes, sir.

12 Q. Now, you testified you had no idea who was behind that  
13 gate until, what, the BLM pulled out? When all the cars pulled  
14 out in the caravan?

15 A. No. I assumed there was BLM agents back there.

16 Q. Back behind the gate?

17 A. Well, back in the impoundment area somewhere.

18 Q. In fact, you thought the green people with the helmets,  
19 that they were contractors; correct?

20 A. That was a possibility.

21 Q. Blackwater government contractors; correct?

22 A. I'm trying to answer, sir, yes. I thought that was a  
23 possibility, sir. I -- if I had to guess, I would -- I was --

24 Q. As we established, the green people were standing in  
25 between the two BLM vehicles; correct?

1 A. Yes, sir.

2 Q. Behind the gate; correct?

3 A. Yes, sir.

4 Q. Where other people, you assumed, were BLM people --  
5 officials were; correct?

6 A. Not necessarily right there, sir.

7 Q. Behind the gate somewhere?

8 A. Somewhere, sir, yes.

9 Q. And where the cows were behind the gate; correct?

10 A. I -- I assumed. I never saw the cows.

11 Q. But, based on everything you saw, you assumed the cows  
12 were behind the gate?

13 A. Somewhere back there, yes.

14 Q. Because as we heard, the crowd was yelling, open that  
15 gate?

16 A. Yeah. I just assumed that they -- that that was the  
17 impoundment area and the cows were -- not because they were  
18 yelling.

19 Q. And that's where all the people up at the rally site,  
20 where they all came down to; correct?

21 A. At the rally site?

22 Q. On the stage earlier in the day.

23 A. They -- most went to the parking lot as I understood it at  
24 the time.

25 Q. A lot of people came down to the wash; correct?



1 A. Yeah. I found that out later.

2 Q. And a lot of people came to the northbound bridge;  
3 correct?

4 A. Yes, after the parking lot.

5 Q. Including yourself?

6 A. Yes, sir.

7 Q. With your long gun; correct?

8 A. Yes. After I heard they were pointing guns at people.

9 Q. And your vest; correct?

10 A. Yes, sir.

11 Q. And your plates; correct?

12 A. Yes, sir.

13 Q. Wearing your black hat with the white insignia; correct?

14 A. Yes, sir.

15 Q. Now, you gave . . . I believe shortly after, either  
16 when -- right when you left Bundy ranch or when you got home,  
17 you told a story where you went onto Siri on your iPhone and  
18 said, "When's the last time the federal government backed  
19 down"; correct?

20 A. I didn't, sir. Somebody else that was there at the -- at  
21 the camp.

22 MR. MARCHESE: Objection. Hearsay.

23 BY MR. DICKINSON:

24 Q. You never said that?

25 MR. MARCHESE: Objection. Hearsay.

1 THE COURT: Well, it wouldn't be hearsay if he said  
2 it.

3 MR. MARCHESE: Well, he's saying that someone else  
4 said it. So therefore, it's hearsay.

5 MR. DICKINSON: It's a question. So it's not  
6 hearsay.

7 MR. MARCHESE: Well, he's trying to elicit hearsay as  
8 a response.

9 THE COURT: It's not offered for the truth of the  
10 mattered asserted, is it?

11 MR. DICKINSON: No. It wouldn't be.

12 THE COURT: It's overruled.

13 BY MR. DICKINSON:

14 Q. Were you standing next to someone that asked Siri, "When's  
15 the last time the federal government backed down"?

16 A. Yes. At the camp.

17 Q. And what came up on Siri?

18 A. A picture of me.

19 Q. Now, Mr. Marchese asked you some questions about the  
20 interview you gave to Mr. Flynn after -- well, you gave the  
21 interview to Mr. Flynn after "The West Has Now Been Won" sign  
22 was put down; correct? It was after that point in time;  
23 correct?

24 A. I -- I can't be sure of that, sir. I don't know.

25 Q. But you gave it on the bridge; correct?

1 A. Yes, sir.

2 Q. And you said you were momentarily being cocky; correct?

3 A. I was -- I was still pretty angry, yes, sir.

4 Q. All right. Do you see this (indicating), Mr. Parker?

5 A. Yes, sir.

6 Q. And is this a picture you posted onto Facebook on  
7 July 12th, 2015?

8 A. I don't know if I posted it or if I just shared it.  
9 It's -- it was somebody else's picture.

10 Q. On your Facebook page, on July 12th, 2015?

11 A. Yeah.

12 Q. And it appears to be -- do you remember this? You  
13 standing in front of -- you on the northbound bridge?

14 A. I remember it, sir, yes.

15 MR. DICKINSON: All right. I'd move for the  
16 admission of Government 476.

17 THE COURT: Any objection?

18 MR. LEVENTHAL: Objection as to foundation.

19 MR. TANASI: Stewart joins.

20 THE COURT: He just laid the foundation.

21 Any other objection?

22 MR. LEVENTHAL: Relevance.

23 THE COURT: What was the exhibit number,  
24 Mr. Dickinson?

25 MR. DICKINSON: 476, Your Honor.

1 MR. JACKSON: Objection as to relevance.

2 THE COURT: Any other objection?

3 All right. Exhibit 476 will be admitted.

4 (Government Exhibit 476 received.)

5 MR. DICKINSON: Permission to publish?

6 THE COURT: Yes.

7 (Government Exhibit 476 published.)

8 BY MR. DICKINSON:

9 Q. This is you, Mr. Parker (indicating); correct?

10 A. Yes, sir.

11 Q. Mr. Drexler (indicating); correct?

12 A. Yes, sir.

13 Q. You're both posing with your long guns; correct?

14 A. Yes, sir.

15 Q. With this gentleman (indicating)?

16 A. Yes. That's Luca Zanna.

17 Q. And you met him that day; correct?

18 A. I did, sir.

19 Q. And you're on the northbound bridge; correct?

20 A. Yes, sir.

21 Q. It appears most of the people are in the wash? This was  
22 later in the day, after the BLM had left?

23 A. Yes. Yes, sir.

24 MR. DICKINSON: One second, Your Honor.

25 (Counsel conferring.)

1 BY MR. DICKINSON:

2 Q. Do you recognize this (indicating), Mr. Parker?

3 A. Yes, I do.

4 Q. This was -- you posted this on your Facebook page on  
5 November 20th, 2015?

6 A. Yes, I did.

7 MR. DICKINSON: I'd move for the admission of  
8 Government's Exhibit 477.

9 THE COURT: Any objection to 477, other than what's  
10 already been addressed?

11 MR. MARCHESE: Just the same objection as before from  
12 Parker, Your Honor.

13 THE COURT: All right.

14 MR. TANASI: Same objection from Stewart, Your Honor.

15 MR. LEVENTHAL: I would add that -- relevance and  
16 foundation.

17 THE COURT: All right. Same ruling.

18 Exhibit 477 will be admitted.

19 (Government Exhibit 477 received.)

20 MR. DICKINSON: Permission to publish?

21 THE COURT: Yes, you may.

22 (Government Exhibit 477 published.)

23 BY MR. DICKINSON:

24 Q. So, your Facebook page; correct?

25 A. Yes, sir.

1 Q. November 20th, 2015?

2 A. Yes, sir.

3 Q. And you wrote, "Our ongoing weekly tribute to the men and  
4 women who showed up that day who were not me"; correct?

5 A. Yes. I wrote that, sir.

6 Q. And by that day, you meant April 12th, 2014; correct?

7 A. Yes, sir.

8 Q. And then you posted a picture of Mr. Drexler; correct?

9 A. Yes, sir.

10 Q. With the language that's there; correct?

11 A. Yes. It's an old Norwegian prayer.

12 Q. "Lo, do they call to me, they bid me to take my place  
13 among them, in the hallowed halls of Valhalla, where the brave  
14 shall live forever"; correct?

15 A. Yes, sir. I found it on -- yes, sir.

16 MR. DICKINSON: Your Honor, based on the Court's  
17 previous ruling, I just need a few minutes to get those if  
18 we're close to the break.

19 THE COURT: All right.

20 Let's go ahead and take our morning bathroom break  
21 then.

22 Please remember, members of the jury, you are not to  
23 discuss this case with anyone nor permit anyone to discuss it  
24 with you. If anyone should attempt to discuss this case with  
25 you, you're required to tell the Court right away and if you

1 inadvertently hear anything about the case, likewise, please,  
2 remember you are ordered to tell the Court right away.

3 Do not read, or listen to, or view anything that  
4 touches upon this case in any way, and do not attempt to  
5 perform any independent research or investigation regarding  
6 issues touching upon this case and do not form any opinion.

7 It's 9:55. We'll try to be back here by 10:15.

8 Let's go ahead and stand for the jury.

9 (Jury excused from courtroom.)

10 THE COURT: And Mr. Parker, after they've exited,  
11 then you can take your morning bathroom break as well. We just  
12 need you back here by 10:15.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: All right. Off record.

15 (Recess was taken at 9:56 a.m.)

16 (Outside the presence of the jury at 10:18 a.m.:)

17 LAW CLERK: All rise.

18 THE COURT: You want to go ahead and get the jury,  
19 please.

20 COURTROOM ADMINISTRATOR: Yes, Your Honor.

21 Mr. Dickinson, did you have enough time?

22 MR. DICKINSON: Yes, Your Honor. We did it.

23 THE COURT: Okay. Just wanted to make sure you had  
24 time before I brought them in.

25 MR. DICKINSON: Mr. Marchese has agreed with how

1 we're going to proceed with this. We'll make it look nice for  
2 the jury on the official exhibit.

3 (Brief pause in proceedings.)

4 COURTROOM ADMINISTRATOR: All rise.

5 (Jury returned to courtroom at 10:20 a.m.)

6 THE COURT: All right. Everyone may be seated.

7 We're joined by the jury. Mr. Parker is back on the  
8 witness stand, and Mr. Dickinson, you may continue with your  
9 cross-examination.

10 MR. DICKINSON: Thank you, Your Honor.

11

12 FURTHER CROSS-EXAMINATION OF ERIC PARKER

13 BY MR. DICKINSON:

14 Q. Mr. Parker, I'm going to show you what's been marked as  
15 Government's Exhibit 475.

16 Do you recognize this as a photo you posted to your  
17 Facebook account?

18 A. Yes, sir.

19 Q. On June 11th, 2015?

20 A. Yes, sir.

21 MR. DICKINSON: Your Honor, Government moves to admit  
22 Government's Exhibit 475.

23 THE COURT: Any objection to 475?

24 MR. MARCHESE: Same objection Parker.

25 MR. TANASI: Same objection Stewart, Your Honor.



1 THE COURT: All right. Same ruling.

2 Exhibit 475 will be admitted.

3 (Government Exhibit 475 received.)

4 MR. DICKINSON: Permission to publish?

5 THE COURT: Yes.

6 (Government Exhibit 475 published.)

7 BY MR. DICKINSON:

8 Q. So again, this is your Facebook account; correct?

9 A. Yes, sir.

10 Q. June 11, 2015; correct?

11 A. Yes, sir.

12 Q. You added this photo; correct?

13 A. I did.

14 Q. This is a picture of you proned on the northbound bridge  
15 on April 12th, 2014; correct?

16 A. Taking cover, sir. Yes.

17 Q. And it says, "You'll give peace a chance, I'll cover you";  
18 correct? That's what the picture says?

19 A. It says, "You give peace a chance, I'll cover you."

20 Q. "You give peace a chance."

21 I'm going to show you what's been marked as  
22 Government's Exhibit 478, two pages.

23 (Government Exhibit 478 published to witness.)

24 BY MR. DICKINSON:

25 Q. Here's Page 1.

1           Do you recognize this as a picture you posted on  
2     February 5th, 2016?

3     A.    Yes, sir.

4     Q.    And then going to Page -- going to Page 2, there's some  
5     comments and two of the comments are from yourself?

6     A.    Yes, sir.

7     Q.    Right there (indicating)?

8           MR. DICKINSON: Your Honor, I move to admit  
9     Government's Exhibit 478.

10          THE COURT: Any objection to 478?

11          MR. MARCHESE: No new objections Parker, Your Honor.

12          MR. TANASI: Stewart joins, Your Honor.

13          THE COURT: All right. Exhibit 478 will be admitted.  
14     (Government Exhibit 478 received.)

15          THE COURT: You may publish it to the jury.

16     (Government Exhibit 478 published.)

17     BY MR. DICKINSON:

18     Q.    Again, your Facebook page; correct, Mr. Parker?

19     A.    Yes, sir.

20     Q.    February 5th, 2016?

21     A.    Yes, sir.

22     Q.    You posted this picture?

23     A.    Yes, sir.

24     Q.    It says, "The reason Nevada went so well, the dicks were  
25     there when we got there"; correct?

1 A. Yes, sir.

2 Q. And there's law enforcement circled with the word "dicks"  
3 written with arrows in three different places?

4 A. I -- I did not know that that's --

5 Q. My question is, does the picture have "dicks" written in  
6 three different places; correct?

7 A. Yes, it does.

8 Q. One, two, three (indicating), law -- groups of law  
9 enforcement officers are circled in three different places;  
10 correct?

11 A. I wasn't sure who that was.

12 Q. You weren't sure who that was on February 5th, 2016?

13 A. I still don't necessarily believe at this moment sitting  
14 here, right now.

15 Q. Sitting here, after sitting through the trial, you don't  
16 believe those are federal law enforcement officers? Is that  
17 your testimony?

18 A. I don't know who that is. I've -- I've heard from some  
19 federal law enforcement officers, but I don't necessarily know  
20 who's in that picture, sir.

21 Q. And you -- this person commented, "Yes. Always let your  
22 opponents take the field first. That's one of the arts of  
23 war"; correct? That person wrote that on February 5th, 2016,  
24 Don Knott?

25 A. Knight.

1 Q. Knight. In reply to that picture?

2 A. Yeah. He's quoting Sun Tzu, sir.

3 Q. *The Art of War*?

4 A. I believe so.

5 Q. And you respond, "Same idea. I just wrote down a little  
6 different"; correct?

7 A. Yes, sir.

8 Q. And then Jeff Albridge writes, "I always thought one would  
9 want to pick the ground they fight from"; correct?

10 A. Yes. He's -- he's --

11 Q. That's what he wrote; correct?

12 A. That is what he wrote, sir.

13 Q. And you respond, "That's the hard part. Pick the  
14 battlefield, but let them take it first"; correct?

15 A. Yeah. We're debating Sun Tzu, sir.

16 Q. And by "them," you're referring to these federal law  
17 enforcement officers (indicating); correct?

18 A. No. No necessarily, sir. We were just debating Sun Tzu.

19 Q. No?

20 Now, take you back to that -- take you back to your  
21 interview with Mr. Flynn on the bridge.

22 MR. DICKINSON: If we could bring up Government's  
23 Exhibit 83 and publish it.

24 (Government Exhibit 83 published.)

25 MR. DICKINSON: Actually, I apologize. I had one

1 other Government's Exhibit -- before we get to Mr. Flynn's  
2 video, I want to show you what's been marked as Government's  
3 Exhibit 480.

4 COURTROOM ADMINISTRATOR: Mr. Dickinson, can you turn  
5 that?

6 Thank you.

7 (Government Exhibit 480 published to witness.)

8 BY MR. DICKINSON:

9 Q. Do you recognize that as what you updated your Facebook  
10 cover photo on February 16th, 2016?

11 A. Yes. It's a picture of a shirt that somebody made, sir.

12 Q. But you posted this onto your Facebook page; correct?

13 A. Yes, sir.

14 Q. And made it your cover photo; correct?

15 A. Yes, sir.

16 MR. DICKINSON: I'd move for the admission of  
17 Government's Exhibit 480, Your Honor.

18 THE COURT: Any objection, other than the objections  
19 already been addressed, to Exhibit 480?

20 MR. MARCHESE: None, Parker.

21 MR. TANASI: Nothing new Stewart, Your Honor.

22 THE COURT: All right. Exhibit 480 will be admitted.  
23 (Government Exhibit 480 received.)

24 THE COURT: You may publish it to the jury.

25 (Government Exhibit 480 published.)

1 BY MR. DICKINSON:

2 Q. Again, your Facebook page; correct?

3 A. Yes, sir.

4 Q. February 6th, 2016; correct?

5 A. 17 -- no. Yeah. February 17th [sic], 2016.

6 Q. 2016?

7 A. Yes, sir.

8 Q. This appears to be a caricature of you; correct?

9 A. Yes, sir.

10 Q. Pointing your long gun; correct?

11 A. Fair enough, sir.

12 Q. And it says "resist"; correct?

13 A. Yes, it does, sir.

14 MR. DICKINSON: Now, if we could publish Government  
15 Exhibit 83.

16 (Government Exhibit 83 published.)

17 BY MR. DICKINSON:

18 Q. You just said, "We need to keep matching a show of force";  
19 correct?

20 A. Yeah. Keep showing up for things.

21 Q. You just said, "We need to keep matching a show of force";  
22 yes or no?

23 A. As in we, the people? The people in the United States,  
24 sir?

25 Q. You just said, "We need to keep matching a show of force,"

1 Mr. Parker. Can you answer my question; yes or no?

2 A. Yes, sir.

3 MR. DICKINSON: Keep playing.

4 (Government Exhibit 83 published.)

5 BY MR. DICKINSON:

6 Q. Now you're talking about a Texas -- a rancher in Texas  
7 right now under threat from the BLM; correct?

8 A. Yeah. He had -- he had 90,000 --

9 Q. I'd just asking you, that's what you said; correct?

10 A. Yes, sir.

11 MR. DICKINSON: Keep playing.

12 (Government Exhibit 83 published.)

13 BY MR. DICKINSON:

14 Q. Now, you're encouraging people to go to Texas and get on a  
15 bridge and show 'em force; correct?

16 A. Show of force.

17 Q. Show 'em or show of?

18 A. Of.

19 Q. Show of force?

20 A. Yes, sir.

21 Q. Because you had just shown force on a bridge in Nevada;  
22 correct?

23 A. No, sir.

24 Q. You didn't show force on a bridge in Nevada?

25 A. Well, I don't think you're -- I think you're trying to

1     imply something else.

2     Q.    Did you show force on a bridge in Nevada; yes or no?

3     A.    By showing up with my body, sir, yes.

4     Q.    And that day, after you showed up with your body and your  
5     long gun, the cattle were released; correct?

6     A.    Because I showed up with my body and my long gun?

7     Q.    You showed up on that bridge with yourself and your long  
8     gun; correct?

9     A.    Yes, sir.

10    Q.    And later that day, the cattle were released; correct?

11    A.    Yes, sir.

12    Q.    Just like Cliven Bundy told you to do; correct?

13    A.    Nobody told me to do anything, sir.

14                 MR. DICKINSON:    Could we keep playing.

15                 (Government Exhibit 83 published.)

16    BY MR. DICKINSON:

17    Q.    You just said, "They threatened to shoot chemicals into  
18    that crowd"; correct?

19    A.    That's what I said, sir.

20    Q.    You didn't say they threatened to shoot bullets into the  
21    crowd; correct?

22    A.    Not while he was recording, sir.

23    Q.    And you thought having the women and children down there  
24    was the only thing that kept the people from getting gassed;  
25    correct?



1 A. I said it might have been, sir.

2 MR. DICKINSON: Keep playing.

3 (Government Exhibit 83 published.)

4 BY MR. DICKINSON:

5 Q. So you absolutely thought it was a good idea to have  
6 children down there; correct?

7 A. He was asking everybody that question, sir.

8 Q. I'm not asking about everybody; I'm asking about you. You  
9 thought it was a good idea to have children in the wash on  
10 April 12th, 2014; correct?

11 A. I think it was . . . I mean, right now?

12 Q. I'm not talking about right now; I'm talking right here in  
13 this video you stated --

14 A. I'm -- I'm being ornery.

15 Q. -- he asked you, "Do you think it was good to have kids  
16 down there?" That's what he asked you; right?

17 A. If it was a good idea.

18 Q. And you said, "Absolutely"; right?

19 A. Yeah. I was -- I was being pretty ornery.

20 Q. You said, "Absolutely"; right?

21 A. Yes -- yes, sir. I said yes.

22 Q. And then you -- he had said, "Do you think this could have  
23 potentially turned violent?" and you said, "Absolutely";  
24 correct?

25 A. On their part, sir.

1 Q. You said, "Absolutely"; correct?

2 A. I absolutely still think it could have turned violent on  
3 their part.

4 Q. You said, "Absolutely"; correct?

5 A. I said, "Absolutely."

6 Q. And last week, when you testified on Thursday, it appeared  
7 you got -- you were getting emotional and were crying about  
8 your time on the bridge; correct?

9 A. Yeah. It -- yes, sir.

10 Q. You're not crying in this video, are you?

11 A. No. I'm angry.

12 Q. And you're not -- Mr. Stewart's not crying in this video  
13 either; correct?

14 A. I can't say one way -- no, I don't think so.

15 Q. Because you testified he was --

16 A. Hitting on girls.

17 Q. -- hitting on girls; correct?

18 A. Yes, sir.

19 Q. All right.

20 MR. DICKINSON: May I have a second, Your Honor?

21 THE COURT: Yes.

22 (Counsel conferring.)

23 MR. DICKINSON: Thank you, Your Honor. I'll pass the  
24 witness.

25 THE COURT: All right.

1 Mr. Marchese?

2 MR. MARCHESE: Thank you, Your Honor.

3 THE COURT: Redirect?

4

5 REDIRECT EXAMINATION OF ERIC PARKER

6 BY MR. MARCHESE:

7 Q. Good morning, Eric.

8 A. Good morning.

9 Q. Just briefly, describe to the jury what "discovery" is.  
10 What's your belief? What's your definition of "discovery"?

11 A. Of "discovery"?

12 Q. Yes.

13 MR. DICKINSON: Relevance, Your Honor?

14 THE WITNESS: All the --

15 MR. MARCHESE: Just foundational, Your Honor. I can  
16 lead if he wants.

17 THE COURT: Go ahead and lead instead.

18 BY MR. MARCHESE:

19 Q. Okay. You received discovery in this case; right?

20 A. Yes, sir.

21 Q. And that's just a fancy word for the reports and the  
22 videos and anything that was collected as evidence in this  
23 case; right?

24 A. Yeah. I believe it was like 1.7 gigabytes or trigabytes  
25 [sic] or something. It was very big.

1 Q. All right. And you reviewed all that discovery; correct?

2 A. Yes.

3 Q. Okay. Now, when did this event occur that -- this  
4 standoff or whatever you want to call it? What is the date on  
5 that?

6 A. Of the actual day of the incident?

7 Q. Sure.

8 A. April 12th, 2014.

9 Q. Okay. And how long after the event have we been in trial?

10 A. We're going on three years now.

11 Q. Okay. What is your recollection -- do you have a  
12 different recollection now of what occurred -- or perception I  
13 should say -- excuse me. Strike that.

14 Do you have a different perception of what occurred  
15 now and what occurred on the date and time on April 12th, 2014?

16 A. Yes, sir.

17 Q. Okay. And why is that?

18 A. I've -- I've watched a lot of video of situations where I  
19 may have been present, but I wasn't listening 100 percent of  
20 the time or paying attention necessarily to every word and  
21 where I've had the chance now to go back and actually listen to  
22 every word over and over.

23 Q. Now, on direct -- on both direct and cross-examination you  
24 received some questions in reference to the Cliven Bundy  
25 speeches.

1 Do you remember those?

2 A. Yes, sir.

3 Q. Now, in reference to your perception, then versus now, do  
4 you have a different perception today as opposed to three years  
5 ago?

6 A. Yeah. A little bit, sir.

7 Q. And what would that little bit consist of?

8 A. Well, I -- I never did hear him -- the sheriff  
9 specifically say . . . that he was going to release the cows,  
10 or that they were releasing the cows. It was my . . . I  
11 perceived at the time that that's what was being talked about  
12 when he said that that would have to be safely discussed, how  
13 it was going to occur, and I just thought that that meant like  
14 the actual logistics of how the cowboys were going to get them,  
15 whether that was trucks or drive them back out on to the range  
16 or whatever.

17 Q. Okay. Now, you were obviously up on the bridge. We have  
18 numerous portions of testimony about that; correct?

19 A. Yes, sir.

20 Q. And there's been numerous portions of testimony in  
21 reference to the loudspeaker; correct?

22 A. Yes, sir.

23 Q. Okay. And you've testified in reference to what you heard  
24 off of the loudspeaker; correct?

25 A. Yes.

1 Q. Okay. Now, in reference to perception of then -- as in  
2 three years ago -- and now -- after hearing all this testimony  
3 and reading the discovery and hearing all the discovery and all  
4 that -- do you have a different perception then versus now?

5 A. Yes, sir.

6 Q. Okay. And what would that perception -- the differing  
7 perception be?

8 A. Um . . . at the time you guys -- everybody's heard. At  
9 the time, it was hard to understand exactly what they were  
10 saying. It was very choppy and muffled. The wind was blowing.  
11 It was hard to understand what -- what -- what exactly they  
12 were saying over the -- over the loudspeaker.

13 Q. Three years ago did you believe that you heard the term  
14 "lethal force"?

15 A. Oh, absolutely.

16 Q. Would you agree with that statement now in -- after  
17 hearing the discovery, hearing the testimony, and all the other  
18 factors in the last three years?

19 A. Uh, I haven't heard it on any of the videos I've watched.  
20 I hear a "less than lethal" a few times where that could have  
21 been . . . so, you know, I would have to say that I didn't hear  
22 it, no, on the videos that I've watched since then. I heard  
23 what I heard on that bridge that day. I heard them -- you  
24 know, numerous times, I heard "will be shot," and I heard  
25 "we've been authorized to use lethal force if you take another

1 step." That's the words I remember.

2 Q. Okay.

3 A. That's when I took cover.

4 Q. Now, on cross-examination you were asked some questions in  
5 reference to your research that you did prior to going to  
6 Bunkerville.

7 Do you remember those questions?

8 A. Yes, sir.

9 Q. Okay. And you were asked some specific questions in  
10 reference to "you can't tell what's real and what is not real  
11 on the Internet."

12 Do you remember that?

13 A. Yes, sir.

14 Q. Okay. How, if at all, were you able to ascertain what was  
15 real and what was not real?

16 A. A couple of different ways. Video is video, first of all.  
17 They say video doesn't lie. I didn't think anybody was editing  
18 video or anything like that. It seemed real. The . . .  
19 Governor Sandoval's statement was real. I believed that. The  
20 things that he was saying in his statement, I believed those to  
21 be true representation of what was happening, and then the last  
22 ways is to go there and find out yourself, to -- to -- I was --  
23 a part of the reason for going was to find out what was true  
24 and what wasn't.

25 Q. On cross-examination you were asked some questions in

1 reference to some Facebook posts, particularly about the "range  
2 war."

3 Do you remember those particular questions?

4 A. Yeah, somewhat.

5 Q. Okay. Now, as to a "range war," at that time, three years  
6 ago, what was your definition? What did you think a "range  
7 war" was?

8 A. I thought he was just using it as a phrase. You know,  
9 he's -- there's some puffery there, I would imagine. You know,  
10 they use that phrase for numerous things. The war on drugs.  
11 The war on poverty. The war on obesity. The term is used a  
12 lot. I didn't necessarily think that they were going to start  
13 a war or, like a shooting war.

14 Q. Okay. How about you personally? Did you want to start a  
15 shooting war?

16 A. No, sir.

17 Q. You were also asked about Exhibit 243, which something  
18 said to the effect of -- a Facebook post -- "What are you going  
19 to do when the shooting starts?"

20 Do you remember that line of questioning?

21 A. Yes, sir.

22 Q. Why did you make that comment?

23 A. At the time I had seen some stuff where they were claiming  
24 that the snipers were all over the place around the ranch and  
25 that they were seeing snipers and that the people were afraid



1 to come out of their house because they were in crosshairs  
2 every time they came out of their house. I -- I -- I read that  
3 they were afraid to let the kids play in the front yard because  
4 of the armed individuals above their ranch with sniper rifles.  
5 That made me think about other situations where stuff like that  
6 has occurred. You know, Ruby Ridge, for instance.

7 MR. DICKINSON: Objection, Your Honor. Now we're  
8 getting into 403 and relevance.

9 THE COURT: Sustained.

10 BY MR. MARCHESE:

11 Q. You saw that statement and it concerned you; correct?

12 A. Yeah, it concerned me very much. I thought that I was  
13 going to wake up one day and see that -- that people in all  
14 black, up on hilltops, shot kids.

15 Q. On cross-examination you were asked some questions in  
16 reference to the Margaret Houston video.

17 Do you remember those questions?

18 A. Yes, sir.

19 Q. Okay.

20 MR. MARCHESE: And Bryan, can you get up 5000D, as in  
21 dog.

22 COURTROOM ADMINISTRATOR: And Mr. Marchese, that has  
23 not been admitted.

24 MR. MARCHESE: It has not?

25 COURTROOM ADMINISTRATOR: No.

1 MR. MARCHESE: Okay. And can we then just publish it  
2 just to Court, counsel, and the witness then.

3 (Defense Exhibit 5000D published to witness.)

4 MR. MARCHESE: Do you have C, as in Charlie?

5 Aaron, I can't read my own handwriting. 5007D, is  
6 that what -- he's saying it's in.

7 COURTROOM ADMINISTRATOR: 5007D was marked; also not  
8 admitted.

9 MR. MARCHESE: Okay. Marked but not admitted. Okay.  
10 And then just play it for Eric and counsel and the  
11 Court.

12 Eric (indicating).

13 (Defense Exhibit 5007D published to witness.)

14 BY MR. MARCHESE:

15 Q. Eric, do you recognize this video?

16 A. I do.

17 Q. How do you recognize it?

18 A. It's a -- how do I recognize it? From the Internet.

19 Q. Okay. So you've previously seen this video?

20 A. Yeah. Before when I said that I saw two different views  
21 of the 9th, this is the other one.

22 Q. Okay. And it fairly and accurately represents what you  
23 saw prior to April 12th, 2014?

24 A. Yes, sir.

25 MR. MARCHESE: Defense moves for 5007D, as in dog, to

1 be admitted.

2 THE COURT: All right. You said he saw it  
3 April 12th, 2014?

4 MR. MARCHESE: I think I said prior to April --

5 THE WITNESS: Prior I saw it. I believe it was  
6 around the 10th.

7 THE COURT: That's 5007?

8 MR. MARCHESE: D, like dog.

9 THE COURT: D.

10 Any objection?

11 MR. DICKINSON: Yes, Your Honor. The Government  
12 objects. The same reason as before. Relevance and 403.

13 The banner says April 7th and also, it's beyond the  
14 scope of cross. I asked Mr. Parker whether he watched  
15 Ms. Houston at the Moapa Cliven Bundy meeting, which was a post  
16 on his Facebook page, which he said he had just posted and  
17 hadn't watched.

18 MR. MARCHESE: Actually, with all due respect, I  
19 would respectfully disagree with Mr. Dickinson. He had asked  
20 some questions in reference to Ms. Houston allegedly standing  
21 in front of the convoy before she was thrown down. This is  
22 basically a carbon copy of the video. It's a little bit  
23 shorter than the one we brought in on direct examination. It  
24 just gives a better angle as to Ms. Houston and what transpired  
25 on the date in question. So, I don't think it is beyond the

1 scope. I believe Mr. Dickinson opened the door by asking those  
2 particular questions on his cross to Mr. Parker and like I  
3 said, it's basically the same video that we already brought in;  
4 it's just a better vantage point to aid the jury and to see  
5 what really happened.

6 MR. DICKINSON: Actually, Your Honor, I questioned  
7 about the --

8 THE COURT: I don't see in my notes that Mr. Parker  
9 was asked on cross-examination anything about Tasing. I do see  
10 the questioning about Ms. Houston.

11 MR. MARCHESE: Correct. And it's -- I don't believe  
12 Mr. Dickinson did ask about Tasing, it was more about  
13 Ms. Houston, and I don't believe that this video depicts any  
14 Tasing.

15 MR. DICKINSON: I asked about if Mr. Parker had seen  
16 the Moapa Town meeting where Ms. Houston spoke and I was  
17 speaking about her description of what had occurred.  
18 Mr. Parker then denied seeing it; he had just posted it on his  
19 Facebook page. I was specifically referencing Ms. Houston's  
20 own words.

21 MR. MARCHESE: Well, in one way or another, I would  
22 argue that by asking that particular question, that he did, in  
23 fact, open the door.

24 THE COURT: Yeah. It does appear it's beyond the  
25 scope of cross.

1 Motion to admit is denied.

2 (Counsel conferring.)

3 MR. MARCHESE: Your Honor, are there any 5007  
4 exhibits there are in? Because we're all having something as  
5 being -- as in.

6 COURTROOM ADMINISTRATOR: No.

7 I believe I addressed this with Mr. Ginn, Bryan, the  
8 other day, that none of the 5007s have been admitted.

9 MR. MARCHESE: Because I know that there was one  
10 admitted with Mr. Stover, Agent Stover. There was one that was  
11 played in court. I know -- I remember.

12 COURTROOM ADMINISTRATOR: 5007D, the one that you  
13 just played was --

14 MR. MARCHESE: Oh. Just any 5007s.

15 COURTROOM ADMINISTRATOR: That's the only one that's  
16 been marked.

17 MR. MARCHESE: Okay.

18 COURTROOM ADMINISTRATOR: It was marked with  
19 Agent Stover, but was not admitted at the time. That's the  
20 only one I have.

21 MR. MARCHESE: Okay. I'll move on.

22 BY MR. MARCHESE:

23 Q. On cross-examination you were asked some questions about  
24 the Alex -- or the Alex Ellis/Michael Flynn video on the  
25 bridge.

1 Do you remember that?

2 A. Yes, sir.

3 Q. That was the one where you said Steven was hitting on  
4 girls or something along those lines?

5 A. Yes, sir.

6 Q. And you were asked a myriad of questions in reference to  
7 "show of force."

8 Do you remember using that particular term?

9 A. I do.

10 Q. Okay. What is your definition of "show of force"?

11 A. Showing up, where . . . if enough people show up, I --  
12 I -- I see that as a show of force, where enough people that  
13 disagree with the -- the actions of -- or the militarized  
14 presence or the misconduct, show up to voice their -- it's  
15 about people showing up.

16 Q. Okay. Now, showing up, does that mean violence?

17 A. No, sir.

18 MR. MARCHESE: And Bryan, can we bring up  
19 Government's Exhibit 478, please.

20 COURTROOM ADMINISTRATOR: What was that number?

21 MR. MARCHESE: 478. I think it was just admitted.  
22 Hopefully.

23 And this is just the first page, for the record.

24 (Government Exhibit 478 published.)

25 ///

1 BY MR. MARCHESE:

2 Q. And Eric, was this posted on your Facebook?

3 A. It was.

4 Q. How did it get on your Facebook?

5 A. I posted it.

6 Q. Okay. Was it something that you made, or did you share  
7 it, or how did that work?

8 A. I put the circles and the comments on there.

9 Q. All right. Now, when you say the comments, are you saying  
10 the reason and the -- all that verbatim -- or verbiage?

11 A. No. The -- the -- the circle with the writing on there.

12 Q. Okay. So someone else did --

13 A. Dicks. I called them dicks.

14 Q. Okay. Why?

15 A. Because they were pointing guns at women and children and  
16 myself and they threatened to shoot people that day, who I felt  
17 were just exercising their First Amendment right, who I felt  
18 went there under context of what the sheriff had said.

19 They put out a press release saying that everybody  
20 was going to be gone. The sheriff told us -- you know, what  
21 the sheriff didn't say was, you know, I'd like you guys to not  
22 go over there because there's a bunch of people dressed in  
23 combat gear sitting in foxholes waiting to shoot you. I don't  
24 think we would have went over there that day if that's what was  
25 said at that stage.

1 Q. On cross-examination the Government showed you numerous  
2 videos from Michael Flynn.

3 Do you remember those videos?

4 A. Yes, sir.

5 Q. Okay. Now, in those particular videos he showed you some  
6 screenshots as well.

7 Do you remember those?

8 A. Yes, sir.

9 MR. MARCHESE: And for the record, this is  
10 Government's Exhibit 472.

11 (Government Exhibit 472 published.)

12 BY MR. MARCHESE:

13 Q. Do you remember seeing this screenshot?

14 A. Yes, sir.

15 Q. And do you remember, when he was playing the video for  
16 you, there was some audio from Mr. Flynn?

17 A. Yes, sir.

18 Q. Okay. And in this particular picture what is depicted?  
19 Which way are these (indicating) particular individuals facing?

20 A. Towards the impoundment site.

21 Q. Okay. And I'm going to circle a higher portion on the  
22 screen (indicating).

23 Now this second circle, from your recollection of  
24 everything, whether it be on the date of and watching the  
25 video, what are these individuals facing?



1 A. The crowd, and the -- and the people on the northbound  
2 bridge and the southbound bridge.

3 Q. Now, from the testimony and the video, was Mr. Flynn with  
4 someone when he was filming this -- this portion?

5 A. I've been led to believe that he was with Alex Ellis.

6 Q. Okay. And that's the young man that came in and testified  
7 a couple months ago?

8 A. Yes, sir.

9 Q. Okay. And on that particular video that was played in  
10 court, towards the end, do you remember Mr. Flynn saying, "Get  
11 ready to hit the dirt if there's firing?" Do you remember  
12 that?

13 A. Yes, sir.

14 Q. Okay. And based upon what you've seen in this particular  
15 screenshot, what did you take that to mean?

16 MR. DICKINSON: Objection, Your Honor. Unless he  
17 heard it at the time.

18 THE COURT: How is it relevant, Mr. Marchese?

19 MR. MARCHESE: I'll move on, Your Honor.

20 THE COURT: Okay.

21 BY MR. MARCHESE:

22 Q. You were arrested in this particular case, Mr. Parker?

23 A. Yes, sir.

24 Q. Taken into custody in your hometown; correct?

25 A. Yes, sir.

1 Q. When you were taken into custody, you were driven by the  
2 FBI to Boise; correct?

3 A. Yes, sir.

4 Q. And you spoke to the FBI; correct?

5 A. I did.

6 Q. And it was voluntarily you did that; right?

7 A. Absolutely, sir.

8 Q. The FBI, they followed all the proper procedures and  
9 protocol, they read you your rights; correct?

10 A. Yes, sir.

11 Q. And when they read you your rights, you understood them;  
12 correct?

13 A. I did, sir.

14 Q. All right. But you wished to waive those rights; correct?

15 A. I did.

16 Q. You didn't ask for an attorney to be present; correct?

17 A. No, sir. I didn't feel like I needed one.

18 Q. Okay. So, when you spoke to the FBI, it was freely,  
19 voluntarily, and knowingly; correct?

20 A. It was, sir.

21 Q. Okay. And we've actually heard some of that interview  
22 already here in court; right?

23 A. Yes, sir.

24 Q. Okay. But you've heard the whole thing; right?

25 A. Yes, in the discovery.

1 MR. DICKINSON: Objection, Your Honor.

2 MR. MARCHESE: I'm laying foundation.

3 MR. DICKINSON: We know why there was only portions  
4 played.

5 MR. MARCHESE: Well, I'm just trying to lay a  
6 foundation, Your Honor. That's all.

7 THE COURT: All right. Lay a foundation.

8 MR. MARCHESE: Okay.

9 BY MR. MARCHESE:

10 Q. And you've heard the whole video; right?

11 A. Yes, sir.

12 Q. And when you heard the whole video, that video is a true  
13 and accurate representation of that interview; right?

14 A. It is, sir.

15 Q. In no way do you feel that the FBI doctored it or twisted  
16 your words around or anything like that; right?

17 A. No. Absolutely not, sir.

18 Q. All right. What you hear on the -- on the audio is, in  
19 fact, what you said on that date; right?

20 A. Yes, sir.

21 Q. And what -- what date, if you remember, were you arrested  
22 on?

23 A. The . . . March 3rd, I believe, sir.

24 Q. Okay.

25 MR. MARCHESE: Your Honor, at this time defense

1 moves --

2 THE COURT: It's still hearsay.

3 MR. MARCHESE: It's a prior consistent statement,  
4 Your Honor. He is subject to -- under 801(d), he is subject to  
5 cross-examination, obviously. His statement is consistent with  
6 the testimony that he has given on the stand, whether it be  
7 last week or today, and we are using it for the sole purpose to  
8 rebut the Government's assertion that he is fabricating the  
9 testimony or he's using an improper motive when he's saying  
10 what he's saying and we're simply using it for that purpose.  
11 So, I believe that under 801(d)(1)(D) this testimony is, in  
12 fact, admissible as a prior consistent statement.

13 THE COURT: Mr. Dickinson?

14 MR. DICKINSON: Your Honor, specific to rebut or  
15 express an implied charge the defendant "recently" fabricated  
16 and I don't think that was done on cross-examination and at the  
17 point of his discussions with Mr. Seyler and being arrested  
18 with the FBI, he already obviously had a motive to not tell the  
19 complete truth as well.

20 MR. MARCHESE: Well, if that's the case, Your Honor,  
21 then I believe that the Government is making my argument for  
22 me.

23 If you look at 801(1)(B)(i) -- or (i), there's three  
24 portions. Mr. Dickinson brings up that it was a recent  
25 fabrication, that's one portion. But he said something in

1 reference to his motive in testifying. So that's the last  
2 portion, and I believe Mr. Parker's post-arrest statement comes  
3 in for that particular purpose. And I would also -- I would  
4 also argue that it goes under -- that it was recently  
5 fabricated or it was a recent improper influence, but it comes  
6 in under any of those three particular portions, Your Honor.  
7 That's our position.

8 MR. DICKINSON: I'm not sure I attacked Mr. Parker's  
9 motive to testify.

10 THE COURT: Has to be -- yeah. It's not admissible.  
11 Under Rule 801(d)(1)(B)(i), needs to be "to rebut an express or  
12 implied charge that the declarant recently fabricated it or  
13 acted from a recent improper influence or motive in so  
14 testifying." It's not attacked on other grounds.

15 MR. MARCHESE: Well --

16 MR. DICKINSON: I don't believe I impeached  
17 Mr. Parker with any prior statements.

18 THE COURT: Yeah. So it's not admissible.  
19 Motion to admit is denied.

20 MR. MARCHESE: We have no further questions.

21 THE COURT: Redirect [sic]?

22 MR. DICKINSON: Can I just have one moment,  
23 Your Honor?

24 THE COURT: Yes.

25 (Counsel conferring.)

1 MR. DICKINSON: Just one or two questions,  
2 Mr. Parker.

3

4 RE CROSS-EXAMINATION OF ERIC PARKER

5 BY MR. DICKINSON:

6 Q. Mr. Marchese was discussing with you about discovery;  
7 correct?

8 A. Yes, sir.

9 Q. Now, some of the evidence at trial you've had an  
10 opportunity to see every word; correct?

11 And in re -- in that line of questioning, it was  
12 about what the sheriff had said on the stage; correct?

13 A. Yes, sir.

14 MR. DICKINSON: Can we bring up 235? Government's  
15 Exhibit 235?

16 (Government Exhibit 235 published.)

17 BY MR. DICKINSON:

18 Q. And your Facebook post; correct?

19 A. Yes, sir.

20 Q. April 12th, 2014; correct?

21 A. Yes, sir.

22 Q. "Bundy gave the sheriff one hour to disarm the BLM. He  
23 did not reply. We are now going to free the cattle by any  
24 means. The sheriff claimed the BLM is standing down, but  
25 offered no proof. This is when Mr. Bundy gave him the

1 'do-it-or-else.' We will not be lied to."

2 You wrote that on April 12th, 2014, at 11:24 Nevada  
3 time; correct?

4 A. Yeah. There's like three different statements --

5 Q. That's what you wrote --

6 A. -- right?

7 Q. -- correct?

8 A. I mean -- yes, sir.

9 Q. This one right here (indicating)?

10 A. You only want yes or no? I'm sorry. I didn't mean to --  
11 yes -- yes, I did, sir.

12 Q. All right.

13 MR. DICKINSON: No further questions, Your Honor.

14 MR. MARCHESE: Nothing based on that, Your Honor.

15 THE COURT: All right. Let's go ahead and take a  
16 lunch break, so we've got a little bit of time.

17 Do you think, Aaron, 12:30 --

18 COURTROOM ADMINISTRATOR: Yes, Your Honor.

19 THE COURT: -- will be enough time?

20 All right. We're going to go ahead and take a little  
21 bit of a longer lunch today until 12:30.

22 During this time we do ask the jury to please  
23 remember you are not to discuss this case with anyone nor  
24 permit anyone to discuss it with you.

25 Please do not read, or listen to, or view anything

1 that touches upon this case in any way.

2 And please do not attempt to perform any research or  
3 any independent investigation about the case, and do not form  
4 any opinion.

5 We'll go ahead and stand for the jury and welcome  
6 them back at 12:30.

7 (Jury excused from courtroom at 11:02 a.m.)

8 THE COURT: All right. The jury has left the  
9 courtroom.

10 Mr. Parker, you can go ahead and take your seat.

11 (Witness excused.)

12 THE COURT: Does defense plan to call any other  
13 witnesses?

14 MR. TANASI: None from Stewart, Your Honor.

15 MR. MARCHESE: None from Parker.

16 MR. LEVENTHAL: Not at this time, Your Honor, on  
17 behalf of Mr. Drexler.

18 MR. PEREZ: None from Lovelien.

19 THE COURT: Well, at this time or any time?

20 MR. LEVENTHAL: Any -- at this time. We've spoken --

21 THE COURT: All right. You said "at this time." I  
22 didn't know if you had someone coming later.

23 MR. LEVENTHAL: No.

24 THE COURT: No.

25 MR. LEVENTHAL: Unless he changes his mind in the



1 next two minutes, not at this time.

2 THE COURT: Okay.

3 MR. LEVENTHAL: No one else.

4 MR. GEORGE: I'm sorry. I missed the question.

5 THE COURT: The question is, Do you have any other --  
6 do you have any witness to call?

7 MR. GEORGE: No.

8 MR. PEREZ: None from Lovelien.

9 THE COURT: All right. So at this time it looks like  
10 the defense is going to rest; is that right?

11 MR. PEREZ: Yes, Your Honor.

12 MR. TANASI: Yes, Your Honor.

13 MR. MARCHESE: Yes, Your Honor.

14 THE COURT: And does the Government have any rebuttal  
15 witnesses it wishes to call?

16 (Counsel conferring.)

17 MR. MYHRE: We don't anticipate any rebuttal,  
18 Your Honor. Based on that, I'd like a few minutes to think  
19 about it, though, and then I should have a decision shortly  
20 after the -- at the lunch break or after the lunch break.

21 THE COURT: All right. So, my next question was  
22 going to be if we don't intend to have any more witnesses  
23 coming in today, then does it make sense to excuse the jury,  
24 have them come back tomorrow morning for closing? I can give  
25 you all afternoon to argue about the other jury instructions

1 that were left open for discussion and then I can give you my  
2 ruling.

3 MR. MYHRE: Yes, Your Honor. I --

4 THE COURT: And then that way you'll have the actual  
5 language to use in your preparation for closing.

6 MR. MYHRE: I have some thoughts on that.

7 THE COURT: Do you want to do closing tomorrow or  
8 next day? I'm trying to make sure I don't give the wrong  
9 information to the jury.

10 MR. MYHRE: Thank you, Your Honor.

11 What we would propose, Your Honor, if -- I'm assuming  
12 the Court's going to canvass the remaining defendants with  
13 respect to their rights to testify and assuming that nothing  
14 changes with respect to that, what the Government would propose  
15 would be that we would hash out what remaining jury  
16 instructions we have this afternoon and we would ask for a day  
17 to prepare for closing given the -- you know, the defense case  
18 and so forth that we've had to prepare for and we would ask to  
19 do the summation and then the defense argument and rebuttal on  
20 Wednesday.

21 THE COURT: All right. Anybody have an alternative  
22 plan or any objection to that plan?

23 MR. TANASI: No objection from Stewart, Your Honor.

24 MR. MARCHESE: Whatever the Court -- whatever the  
25 Court's pleasure. Just not today.

1 THE COURT: Okay. No. I wasn't going to make you do  
2 it today.

3 MR. LEVENTHAL: There's no objection on behalf of  
4 Mr. Drexler.

5 MR. GEORGE: No objection.

6 MR. JACKSON: No objection, Your Honor.

7 MR. PEREZ: No objection.

8 THE COURT: All right. So -- you all can sit down.

9 Let me go ahead and ask each of you -- each of the  
10 defendants, just to clarify, whether anyone wishes to take the  
11 stand.

12 So starting with Mr. Stewart, sir, you probably  
13 remember me saying this before, but there's been so much going  
14 on I'm going say it again anyway. So there's quite a few  
15 decisions that an attorney makes on your behalf, for strategic  
16 purposes, with his experience and so forth and there are,  
17 however, decisions that the defendant gets to make on his own,  
18 you know, with -- with the advice of counsel, but it's  
19 completely up to you whether or not you want to accept a plea  
20 negotiation, whether or not you want to go to trial, whether or  
21 not you want to testify, and whether or not you want to appeal.  
22 So, at this point I'm asking you, have you made a decision as  
23 to whether or not you would like to testify?

24 DEFENDANT STEWART: Yes.

25 THE COURT: And have you had sufficient time to

1 discuss that decision with your attorney?

2 DEFENDANT STEWART: Yes.

3 THE COURT: And so, do you wish to testify in this  
4 case?

5 THE DEFENDANT: No.

6 THE COURT: All right.

7 And Mr. Drexler, same questions.

8 Have you made a decision as to whether you would like  
9 to testify?

10 DEFENDANT DREXLER: Yes. I'm not going to testify.

11 THE COURT: All right. And did you have sufficient  
12 time to discuss that with your attorney, Mr. Leventhal?

13 DEFENDANT DREXLER: Yes.

14 THE COURT: All right.

15 And Mr. Engel, have you had sufficient time to  
16 discuss with Mr. George your decision whether or not to testify  
17 today?

18 DEFENDANT ENGEL: Yes, Your Honor.

19 THE COURT: And do you wish to testify?

20 DEFENDANT ENGEL: No, Your Honor.

21 THE COURT: All right.

22 And Mr. Lovelien, did you have sufficient time to  
23 discuss your decision with Mr. Perez?

24 DEFENDANT LOVELIEN: Yes, Your Honor.

25 THE COURT: And do you wish to testify in your case?

1           DEFENDANT LOVELIEN: No, I don't.

2           THE COURT: All right.

3           And Mr. Burleson, have you had sufficient time to  
4 discuss with your attorney your right to testify in this case?

5           DEFENDANT BURLESON: Yes, I have.

6           THE COURT: And do you wish to testify, sir?

7           DEFENDANT BURLESON: No, I don't.

8           THE COURT: All right.

9           So it looks like we are done with the defense case,  
10 according to both counsel and the defendants, and it sounds  
11 like we can go ahead and let the jury know that they're welcome  
12 to stay and have lunch, since it's already been ordered for  
13 them because we didn't know otherwise, but then afterwards they  
14 don't have to stay. They can come back on Wednesday morning?

15           Does everyone agree that's a good plan? I just want  
16 to make sure, or did you still want some more time -- do you  
17 want to come back after lunch and tell me for sure?

18           MR. MYHRE: If I -- I'm sorry, Your Honor. If we  
19 could have, like, 15 minutes, I can wrap this up in terms of  
20 your final decision --

21           THE COURT: All right.

22           MR. MYHRE: -- or final answer, if you will, on  
23 rebuttal.

24           THE COURT: Okay. All right. Well, I don't want to  
25 rush you if we don't have to. The jury is going to be here for

1 a while because their lunch is -- it wasn't already here;  
2 right? It was coming. 11:30?

3 COURTROOM ADMINISTRATOR: It should be here in about  
4 45 minutes.

5 THE COURT: We just happened to get done with  
6 Mr. Parker earlier than we thought that -- so the lunch is  
7 probably not even still here for them.

8 So we can take about a 30 minute break and come back.

9 MR. MYHRE: Thank you, Your Honor.

10 THE COURT: All right. Let's do that. It's 11:08.  
11 We'll come back at 11:38.

12 COURTROOM ADMINISTRATOR: All rise.

13 (Recess was taken at 11:08 a.m.)

14 (Outside the presence of the jury at 11:45 a.m.:)

15 COURTROOM ADMINISTRATOR: All rise.

16 THE COURT: All right. Thank you. You may be  
17 seated.

18 All right. So Mr. Myhre, did you have sufficient  
19 time to discuss and consider whether you want to exercise your  
20 option to call rebuttal witnesses?

21 MR. MYHRE: We did, Your Honor. Thank you. And the  
22 Government will not be presenting rebuttal.

23 THE COURT: All right. Okay. So everyone is still  
24 in agreement that we should take a day off tomorrow and have  
25 closing arguments on Wednesday; is that right?

1 MR. TANASI: Yes, Your Honor.

2 MR. LEVENTHAL: Yes, Your Honor.

3 MR. MARCHESE: Yes, Your Honor.

4 THE COURT: Okay. So we can go ahead and tell the  
5 jury to come back Wednesday morning at 8:30 and then everyone  
6 else, the attorneys here, can take their lunch break and come  
7 back at 1 o'clock so that we can address the remaining jury  
8 instructions, and I actually have a couple of questions on the  
9 jury instructions, even the ones that we've already settled,  
10 for example, on the conspiracy. I'll give you a little more  
11 food for thought during lunch.

12 For conspiracy, there are findings that the jury must  
13 make unanimously as to the overt act; right -- or no. The  
14 object of the conspiracy?

15 MR. MYHRE: That's correct, Your Honor.

16 THE COURT: So there should be an (a) and a (b) and  
17 they need to find unanimously either for (a) or (b). I'm not  
18 asking them -- we're not giving them that option of (a) and  
19 (b); right? Because then they might get confused that they  
20 can --

21 MR. LEVENTHAL: I'm sorry. Are you -- is the  
22 Court --

23 THE COURT: Just think about that one.

24 MR. LEVENTHAL: -- on Page 33? I -- just for my  
25 reference. Is that -- as to Count One, the elements?

1 THE COURT: Right. So it's the . . . let's see, I'd  
2 have to go back to the other page.

3 MR. LEVENTHAL: And again, I'm looking at Document  
4 1426.

5 THE COURT: So it's the conspiracy that can be  
6 committed by either two objectives. So it's Count Two. There  
7 can be two objectives of the conspiracy, (a) or (b), but the  
8 jury must unanimously agree on whether it's (a) or (b). So six  
9 of them can't say it's (a) and six of them say that it's (b);  
10 they have to all 12 unanimously decide that the object is  
11 either (a) or (b). And so my question was, on the verdict  
12 form, we need to make that clear.

13 MR. MYHRE: You know, I don't have the --

14 THE COURT: So just think about it. You don't have  
15 to tell me right now. But think about it at lunch and look it  
16 up.

17 So Count Two has an (a) or (b) and the jury just  
18 decide unanimously as to (a) or (b). And so as far as the  
19 verdict form goes, unanimously find (a), unanimously find (b),  
20 and do you want to include unanimously find (a) or (b), so I'm  
21 not sure.

22 And then . . . I don't think for the 924(c) counts  
23 that we need to ask the jurors to find unanimously the type of  
24 weapon because it sounds like the type of weapon is already the  
25 one that's the least. It's not a short-barreled shotgun or



1 such which would increase the penalties, so I don't think that  
2 we need to unanimously have them find the type of weapon, but I  
3 wanted to also verify with you if I'm missing or forgetting  
4 something.

5 And then Count One also. Does the jury need to find  
6 which is the object under Count One? That's just . . . the  
7 other two.

8 So be back here at 1 o'clock and then we can start  
9 hearing argument on the remaining jury instructions.

10 We can put this down. I can't see Mr. Marchese.  
11 Aaron, can you throw that down.

12 MR. MYHRE: Your Honor, could I raise one more thing  
13 on the jury instructions?

14 THE COURT: Yes. Please.

15 MR. MYHRE: And I discussed with counsel previously,  
16 but I just want to make sure the record is clear. We do have  
17 forfeiture counts, obviously.

18 THE COURT: Right.

19 MR. MYHRE: And my understanding is, is that the  
20 defendants, to whom those counts apply, do -- do not wish to  
21 exercise their right to have a jury hear the forfeiture in the  
22 event there is a, you know, conviction in this case or a  
23 verdict of guilty on any of those counts. I just wanted that  
24 to be clear on the record. That way we won't have to cover a  
25 forfeiture instruction for a --

1 THE COURT: Okay.

2 MR. MYHRE: -- forfeiture jury instruction.

3 THE COURT: Is that right, Mr. Tanasi? You're not  
4 requesting a forfeiture instruction? You're not asking the  
5 jury to find whether the forfeiture count --

6 MR. TANASI: That's correct, Your Honor.

7 THE COURT: Mr. Marchese?

8 MR. LEVENTHAL: As to -- I apologize.

9 MR. MARCHESE: Go ahead.

10 THE COURT: Okay.

11 MR. LEVENTHAL: As to the forfeiture as to what was  
12 seized, we have no objection, but as to any other sort of  
13 the -- you know, and because of the cows were -- have still not  
14 gone back, or that Bundy in some way still owes 1 million  
15 dollars, then I think that there's still an argument there, but  
16 I -- my understanding is, is that it's only to what was seized  
17 at the time of the arrest, i.e., the guns or ammunition and  
18 things of that nature; is that correct?

19 MR. MYHRE: Our position is that with respect to  
20 money judgments or money losses, that's not a jury question;  
21 that would be a question for the Court. This only applies to  
22 the physical property which would be the ammunition or weapons  
23 that were seized on arrest. I believe it would apply to  
24 Mr. Parker, to Mr. Stewart, and to Mr. Engel.

25 THE COURT: So it only applies to Parker, Stewart,

1 and Engel?

2 MR. MYHRE: Yes, Your Honor.

3 THE COURT: All right.

4 So, Mr. Engel or Mr. George, do you agree that you do  
5 not wish to have the jury instructed on the forfeiture count?

6 MR. GEORGE: Yes.

7 THE COURT: Okay. All right.

8 MR. MYHRE: Thank you, Your Honor.

9 THE COURT: Anything else?

10 Be back here at 1 o'clock.

11 COURTROOM ADMINISTRATOR: All rise.

12 Off record.

13 (Recess was taken at 11:51 a.m.)

14 (Outside the presence of the jury at 1:16 p.m.):

15 LAW CLERK: All rise.

16 THE COURT: Thank you. You may be seated.

17 All right. So I had a couple of questions before the  
18 lunch break, and hopefully you had some time to consider that,  
19 for the verdict form, in regards to Count One and Two, the two  
20 conspiracy counts.

21 All right. So starting with Count One, Conspiracy to  
22 Commit an Offense, there are six different offenses which are  
23 listed and the jury is instruction -- instructed that all of  
24 them must agree as to the particular crime which the  
25 conspirators agreed to commit.

1           So should that option be included on the verdict  
2     form?

3           MS. CREEGAN: Your Honor, we don't have an objection  
4     to having a special verdict form that creates the options for  
5     the jury to check each one that they have found.

6           THE COURT: All right. Defense have any objection or  
7     alternative recommendation?

8           MR. TANASI: I think that recommendation would solve  
9     the problem.

10          THE COURT: Okay. Then we'll go ahead and add, on  
11     the verdict form, each of the six alleged charges.

12          And then, for Count Two, Conspiracy to Impede or  
13     Injure a Federal Officer, there are two options; one is a to  
14     prevent by force, intimidation, or threats federal law  
15     enforcement officers from discharging the duties of their  
16     office under the United States or, second option is, number two  
17     is, to induce by force, intimidation, or threats any federal  
18     law enforcement officer of the United States to leave the place  
19     where their duties were required to be performed, and they need  
20     to agree unanimously.

21          We tell them, "You must find that there was a plan to  
22     commit at least one of the alleged objects of the conspiracy  
23     with all of you agreeing as to the particular object which the  
24     conspirators agreed to commit."

25          So it seems that we need to give them that option as

1 well of one or two, but then my question was, do we also give  
2 them the option of one and two and is -- I guess the  
3 instruction is clear that it has to be unanimous.

4 MS. CREEGAN: Your Honor, we would propose putting on  
5 the verdict form that they can check each one that they've all  
6 unanimously found, so they can check up to six for Count One  
7 and up to two for Count Two.

8 THE COURT: Okay.

9 MR. TANASI: Your Honor, I know we moved on from one,  
10 but if we can go back to it for a second. I think it would be  
11 also important for the jury to check which -- at least for  
12 Count One, which crime they believe which defendant committed.  
13 In other words, not -- not just that they found unanimously  
14 assault, but, you know, was it unanimously that Steven Stewart  
15 committed the assault and so on and so forth for each  
16 defendant.

17 THE COURT: For Count One you mean?

18 MR. TANASI: Yes, Your Honor. And I know we moved  
19 past that and I apologize for going backwards.

20 THE COURT: Does the Government agree?

21 MS. CREEGAN: Well, as long as they're finding at  
22 least one. If not, they would have to acquit that person. So  
23 I'm not sure what it adds to say how many of the count -- the  
24 different crimes that particular person conspired to,  
25 especially since they'd be liable under *Pinkerton* liability.

1 So, I guess I'm not sure what that adds.

2 THE COURT: Right. Because first they're finding  
3 whether or not a conspiracy exists to commit any of the crimes  
4 charged, 1 through 6, and then -- because that's the first  
5 element. The second element is "the defendant became a member  
6 of the conspiracy knowing of at least one of its objects and  
7 intending to help accomplish it." So I don't think it's  
8 necessary to parse it out for each defendant so long as we have  
9 those six options first and then the second element is which,  
10 if any, of the defendants became a member.

11 MR. TANASI: And I guess what I was getting at is by  
12 committing which object, which underlying crime.

13 MS. CREEGAN: Well, the underlying crimes are  
14 separate counts. This is whether they joined the conspiracy.  
15 So first, the jury determines whether there's a conspiracy and  
16 its objects and then it either finds guilty or acquits each  
17 defendant of having meant to promote one of those objects, but  
18 not necessarily all of them.

19 MR. JACKSON: Your Honor, I -- excuse me. I think  
20 for appellate purposes it's important we know which one they  
21 found the defendant to have conspired to have done. Otherwise,  
22 it would be impossible to determine whether, under *Jackson vs.*  
23 *Virginia*, there was sufficient evidence that the person  
24 actually conspired. If -- for each defendant, there might be a  
25 separate and distinct crime that they conspired to do. I think

1 we should know from the jury what they determined. It might be  
2 a complex task for the jury to determine, but I think it's  
3 necessary, especially when they lump these many different  
4 possibilities before the jury. They should have to ascertain  
5 which one applies to which defendant. It might be that for  
6 some of the defendants they find that they didn't, in fact,  
7 conspire to commit any of those crimes and therefore, they  
8 should reach the conclusion that they're not guilty of  
9 conspiracy at all, and that's our point.

10 THE COURT: Well, there's only one conspiracy that  
11 has six different allegations of -- of a crime, but there's  
12 only one conspiracy. So they each are either not guilty or  
13 guilty of the one conspiracy. The only reason we break down  
14 the six options are so the jury realizes that they need to be  
15 unanimous as to at least one of those options and they can't  
16 have two people think that one of the options and three people  
17 thinks it's the other option and four people think it's the  
18 other option. You knows, it has to be all 12 of them has to  
19 agree on at least one of -- at least one of these six was  
20 committed. After that, then the second element is whether or  
21 not the defendants were or were not a member of the conspiracy.  
22 So I think that it's sufficient to just break up the six  
23 options and we don't have to individually have the jury find  
24 which one of those six options they think that the defendant  
25 was agreeing to commit. Because again, we have the aiding and

1 abetting at the back end as well.

2 All right. And I think -- let me look at my little  
3 yellow stickies here to see if there was another question that  
4 I needed to ask you, too.

5 In the instruction relating to Count Eight,  
6 Threatening a Federal Law Enforcement Officer, there's a couple  
7 of definitions there at the end which are definition of  
8 "impede," to "intimidate," "interfere with," to "retaliate"  
9 that's not in the model instruction so I just want to make  
10 sure, but you want me to include those anyway; is that right?

11 MS. CREEGAN: We think it would help the jury to  
12 understand the meaning of those terms.

13 THE COURT: I don't disagree; I just wanted to make  
14 sure that I was clear that that was what you had agreed on.

15 Okay. And then what's my other one here?

16 Oh. So then on Count Twelve, the Obstruction of  
17 Justice, the model jury instruction has one last sentence that  
18 is not included in the one that you all provided. That last  
19 sentence is, "The word 'corruptly'" -- in quotation marks --  
20 "The word 'corruptly' as used in this instruction means that  
21 the act must be done with the purpose of obstructing justice."

22 So, was that an oversight or is there reason we don't  
23 want that in there? Are they not charged with corruptly?  
24 Because I think it was in the Superseding Indictment, that  
25 corruptly was one of the manner -- different ways that the



1 offense can be committed.

2 MS. CREEGAN: We don't have an objection to adding  
3 that.

4 THE COURT: I'm sorry. I couldn't hear you. You  
5 don't have an objection to adding that?

6 MS. CREEGAN: To adding that.

7 THE COURT: And how about from the defense?

8 It's the last line of Count Twelve. The instruction  
9 in the model jury instructions includes the definition of  
10 "corruptly" and for whatever reason it was not in the  
11 stipulated instruction provided to the Court. So I didn't know  
12 if it was just an oversight or if there's a reason why you  
13 don't want it to be defined that way. Is there a case that I'm  
14 not aware of that said that that's not the proper definition?  
15 I couldn't figure it out, so I thought that I'd just ask you.  
16 It sounds like it was just an oversight. Keep it in there?

17 MR. TANASI: I think it probably was, but just, for  
18 the record, what is that last sentence? I just don't have it  
19 in front of me.

20 THE COURT: It says, "The word 'corruptly'" -- and  
21 then corruptly is in quotation marks -- "as used in this  
22 instruction means that the act must be done with the purpose of  
23 obstructing justice."

24 MR. TANASI: I think that's probably just an  
25 oversight then, Your Honor. I don't --

1 THE COURT: Yeah. It's clearly the law but . . .

2 Okay. So we'll go ahead and add that, even though  
3 it's not in the stipulated.

4 (Brief pause in proceedings.)

5 Okay. And then Count -- well, the instructions for  
6 Counts Six, Nine, and Fifteen, the Using, Carrying, or  
7 Brandishing a Firearm, I just want to be clear how you want  
8 this stated because . . . first, the jury finds whether or not  
9 the firearm was used or carried and then if they find that it  
10 was used or carried, then they determine whether or not it was  
11 brandished. So the used or carried is like a precursor to even  
12 getting to the brandished. So it's not that they have three  
13 options; it's that they have two options first and if they find  
14 one of the two options, then they go to brandished, but the way  
15 it's worded here starts with it being called "used, carrying,  
16 or brandishing" as if there are three options. But I think the  
17 elements are clear. So it's just really the first sentence of  
18 it says, "The defendants are charged in Count Six, Nine, and  
19 Fifteen of the Superseding Indictment with Using, Carrying, and  
20 Brandishing a firearm during and in relation to." I guess it's  
21 technically correct that that's what they're charged with; I  
22 just didn't know if that was misleading to make it sound like  
23 there's three options when there's really only two and then the  
24 brandishing is -- comes later.

25 Maybe I'm just being picky. It just -- it just --

1 when I read it through, it seemed not as clear as it could be,  
2 but maybe there's no way to clarify it.

3 MS. CREEGAN: Just didn't want to fail to state that  
4 we were also charging brandishing when we were giving them the  
5 first instruction, but I would argue it's clear that at first  
6 they have to find the use and carry and then they have to find  
7 and it's also clear on the verdict form that they proceed from  
8 one to the other.

9 THE COURT: Right. Because brandished isn't  
10 mentioned as the second element. The second element only  
11 mentions use or carry so that brandish comes in at the end, if  
12 you find that there's use or carry.

13 Oh. And then it mentions -- here's another one. So  
14 the first element is "the defendant committed the underlying  
15 crime as charged in Counts Five, Eight, and Fourteen." Makes  
16 it sound like you have to find all three. Should that be an  
17 "or"?

18 MS. CREEGAN: Yes. I think so, Your Honor.

19 THE COURT: And then, again, at the -- at the end,  
20 Line 7 there. It says, "If you find a defendant guilty of  
21 using or carrying a firearm during or in relation to the crime  
22 of violence," it says "as charged in Counts Six, Nine," I guess  
23 that would be "and Fifteen" because it's -- because they're  
24 charged together. They're all -- it's and -- no. If you find  
25 . . . I think that should be an "or" also.

1 MS. CREEGAN: I think that should be an "or" as well,  
2 Your Honor. Thank you.

3 THE COURT: Okay.

4 All right. Any other issues with the current  
5 stipulated or already ruled on jury instructions that you want  
6 to bring to my attention before I finalize all the typos and  
7 commas and things in there?

8 Okay. Then let's move on to the next group of  
9 instructions. There were a few that I intentionally did not  
10 give final rulings about because I wanted to see what the  
11 defense evidence was and then during the interim there were  
12 some other jury instructions that were proffered as well. So,  
13 let me tell you how I've organized them and we'll let you argue  
14 if you'd like to.

15 So, the first one is the self-defense or defense of  
16 others instruction which has two alternatives, one is the  
17 mistaken identity under *Feola* and the second one is the  
18 excessive force under *Span*, then there's a justification  
19 defense, then there's the mere presence defense, and then there  
20 were four new ones that were offered; the first one is a lesser  
21 included offense that was offered -- proffered by Mr. Tanasi.  
22 Then there's the involuntarily confessions and chain of custody  
23 instruction proffered by Mr. Jackson, and finally, a  
24 circumstantial evidence instruction that was proffered by  
25 Mr. Perez.

1           So, does the defense want to go first, since these  
2           are your proffered instructions? Do you want to be heard on  
3           any of these or just submit them?

4           MR. MARCHESE: Which one would we be starting with,  
5           Your Honor?

6           THE COURT: Whichever one you want. I just wanted to  
7           make sure I have all of them that -- I listed all of them and I  
8           didn't forget any that you've provided.

9           MR. MARCHESE: I believe that is -- there weren't any  
10          additional ones, no.

11          THE COURT: Okay. So we're all on the same page as  
12          far as how many we have left to address. So whichever one you  
13          want to address is fine. You don't have to address them all,  
14          just whichever ones you want to address.

15          Mr. Tanasi, you want to go first?

16          MR. TANASI: Oh. Sure, Your Honor.

17          With respect to the self-defense, I think -- you  
18          know, I think kind of the same arguments that we've proffered  
19          in the past still hold true in that I think both -- I'd say  
20          both instructions would be available at this time and, you  
21          know, I certainly think, especially after Mr. Parker's  
22          testimony, both are viable.

23          And again, you know, we've heard from Mr. Parker and  
24          his testimony that he believed that they were Blackwater  
25          contractors, something to that effect and so I think that

1 the -- that that triggers the *Span* instruction and then with  
2 respect to the *Feola*, again, I think that that's still viable  
3 even kind of alternatively, I guess.

4 So . . .

5 THE COURT: You mean the Blackwater contractors  
6 triggers *Feola*, the unknown?

7 MR. TANASI: Right.

8 MR. MARCHESE: Correct. And I don't mean to step on  
9 Mr. Tanasi's toes --

10 MR. TANASI: Go ahead.

11 MR. MARCHESE: -- but we had a conversation at lunch  
12 in reference to this.

13 THE COURT: Okay.

14 MR. MARCHESE: We just don't want to be foreclosed  
15 on -- if the jury finds that Mr. Parker or whichever  
16 defendant's belief was unreasonable or -- in that the  
17 individuals in the wash behind the fence, if the jury looks at  
18 it and says no, they were, in fact, law enforcement, that's a  
19 terrible argument, then we believe that we're just completely  
20 foreclosed on arguing that. So, first, we would ask for, you  
21 know, the jury to make a finding that whether or not they were,  
22 in fact, law enforcement -- excuse me -- the defendants thought  
23 that they were, in fact, law enforcement and then, in the  
24 alternative, if they find that no, that's not a credible  
25 argument, we would still ask for the instruction that yes, they

1 were law enforcement and then the proper instruction that goes  
2 along with that.

3 I hope I'm articulating that correctly.

4 THE COURT: Okay.

5 All right. And Mr. Tanasi, you also offered the  
6 lesser included offense instruction.

7 MR. TANASI: Yes, Your Honor.

8 Yeah. And with respect to that, Your Honor, I -- I  
9 constructed it as best I could consistent with the model  
10 instruction. The statute, 18 U.S.C. 111(a) does, in fact, have  
11 two components; a misdemeanor component and a felony component.  
12 I kind of coined the lesser included misdemeanor as the simple  
13 assault to avoid the punishment issues and categorizing them in  
14 an improper way, but basically it comes down to the jury's  
15 decision whether or not the defendants have used a deadly  
16 weapon or some bodily harm had occurred. Those two questions,  
17 if either of the answer -- if the answer to either of those  
18 questions is yes, then it is the felony treatment of -- of the  
19 assault as charged, but if the answer to those questions are  
20 no, then it's misdemeanor treatment. Again, simple assault for  
21 purposes of the instruction. So, again, I would think that  
22 that's a jury instruction -- a jury decision rather to make  
23 that determination.

24 And, you know, this isn't a new concept because,  
25 again, it's contemplated by the model jury instructions, the

1 idea of a lesser included offense.

2 THE COURT: All right. Any other instructions that  
3 you wanted to comment on?

4 MR. TANASI: Mere presence, Your Honor, I still think  
5 that would be a viable instruction, especially, again, given  
6 Mr. Parker's testimony. You know, the picture came up of the  
7 gals that were in the interview in the back and, you know, he's  
8 hitting on girls I think was the phrase. You know, there's  
9 clearly an argument to be made that my client was merely  
10 present and not a member of any conspiracy. Even with respect  
11 to the one picture that the Government has of my client even  
12 holding a weapon, he's pointing it straight up in the air and  
13 again, it lends itself at least to be able to have the jury  
14 ultimately decide whether there's merely present or if he's  
15 part of this nefarious conspiracy.

16 THE COURT: All right.

17 MR. TANASI: I think that's -- those are the only  
18 two, Your Honor, that I was going to address. I know  
19 Mr. Jackson had a couple he had offered and I think Mr. Perez  
20 as well.

21 MR. JACKSON: I'll just speak for the next.

22 THE COURT: All right. Go ahead.

23 MR. JACKSON: The main one I offered was dealing with  
24 confessions or statements of a defendant. I think that there  
25 are two issues basically; the Long Bow statements and the



1 statements my client made to Officer Caputo. There's a very  
2 generic simple instruction that was given that the jury should  
3 consider the circumstances of any statement but doesn't go into  
4 any detail that gives a jury any guidance. That's, I think,  
5 4.1 that the Court has given as an instruction, but I think the  
6 jury has to understand that they should look at the totality of  
7 circumstances and they have to look at whether a statement was  
8 voluntary or whether it was the product of any kind of law  
9 enforcement manipulation or law enforcement interaction that in  
10 some way made the statement unreliable or maybe even  
11 involuntary.

12 In this particular case my client, there was direct  
13 evidence that he was given alcohol at Long Bow. The quantity  
14 is at least a couple of glasses of hard whiskey. Whether he  
15 had more than that is for the jury to determine from looking at  
16 all the facts and circumstances. There's also evidence that he  
17 had a seizure disorder, which the Government was aware of at  
18 the time that they gave him this.

19 There was also issues surrounding his statements he  
20 made to Mr. Caputo about the relationship he had with  
21 Mr. Caputo. The jury has to consider all of those facts in  
22 determining whether or not the statement was voluntary and how  
23 much weight to give it. So I think this instruction is  
24 appropriate so that the jury can analyze carefully the evidence  
25 before it in reaching a proper conclusion.

1           There are substantial studies in the Innocence  
2 Project and other sources saying that the main -- one of the  
3 main reasons for wrongful convictions is when confessions come  
4 in that are involuntary or may be untrue. The facts of this  
5 case suggest that many of the things my client said don't match  
6 the physical evidence. That's why I think this instruction is  
7 appropriate, so at least the jury can put my client's  
8 statements in a proper context. I think it might apply to some  
9 of the other defendants that were interrogated at Long Bow.  
10 That's for them to say, but I urge the Court to grant this  
11 instruction or some variation of it.

12           The other instruction I had dealt with chain of  
13 custody. We had some issues regarding that. I'll submit it on  
14 just the instruction I prepared.

15           I would urge the Court also to consider the arguments  
16 of counsel on the mere presence instructions and the other  
17 instructions that he has suggested.

18           THE COURT: All right. Thank you, Mr. Jackson.

19           Mr. Perez?

20           MR. PEREZ: Yes, Your Honor.

21           With respect to the circumstantial evidence  
22 instruction, I think it clarifies and reconciles, I believe  
23 it's 3.5 and 3.8, of reasonable doubt and circumstantial  
24 evidence. I think perhaps the most important paragraph of the  
25 instruction is that if you've got two conclusions and they're

1 equal weight, I mean, it gives the jury direction to say, you  
2 know, that's got to point to not guilty as opposed to guilty.  
3 I mean, I think the instruction is pretty clear. It's used  
4 widely in California. I don't know about here, but, you never  
5 know. It's worth a try.

6 MR. JACKSON: Your Honor, I'm sorry. There's one  
7 other instruction I don't know if we've already dealt with.  
8 That was a missing witness instruction I proposed that's  
9 dealing with Mr. Love. I've cited some case law for it and  
10 federal jury practice instructions. I think it's appropriate  
11 particularly in this case. I think I argued it once before and  
12 that's why I didn't comment on it particularly, but Mr. Love, I  
13 think, was central to this case and I think that we should at  
14 least be allowed to argue that failure to call Mr. Love, that  
15 the jury should be allowed to draw adverse inferences from his  
16 non-appearance. We weren't able to confront and cross-examine  
17 him or to ask him questions about what exactly was his role in  
18 this matter and I think that's important.

19 THE COURT: All right. Well, I already denied the  
20 missing witness instruction. That was the one --

21 MR. JACKSON: I -- I understand that.

22 THE COURT: -- where we made a point of making sure  
23 that he was not unavailable and I asked Mr. Myhre wasn't that  
24 true that you were going to keep him available and he said yes,  
25 he's been available. The problem was not his availability.

1           MR. JACKSON: So, it's a complex question of law, but  
2 just for the record, we wanted that -- the fact that we  
3 proposed such instruction to the Court. Maybe it's because he  
4 was unavailable for other reasons, but we still think that it's  
5 important that the jury be instructed that he was unavailable  
6 and, you know, maybe corporal rule gets us on that, but we  
7 would like it part of the record that we wanted that  
8 instruction proposed.

9           THE COURT: All right. Same ruling. That's denied.  
10           Mr. Leventhal, did you want to make any other  
11 additional argument?

12           MR. LEVENTHAL: No, Your Honor. I would just join in  
13 the other arguments.

14           THE COURT: All right.  
15           And Mr. John George?

16           MR. LEVENTHAL: I know we talked about whether it was  
17 clear or not what I can say and -- and I can say anything about  
18 the lack of Love and I think the comment, it was clear as mud,  
19 and I think it still is. You know, I don't plan on getting in,  
20 obviously, the reasons why. I -- I -- I'm able to comment on  
21 closing -- I've never been not been able to comment on  
22 closing -- on whether a witness is here or not, whether it's  
23 Love or anyone else for that matter. So, I know -- I  
24 understand the Court's ruling on not having the jury  
25 instruction, but I am going to be able to comment on it in

1 closing.

2 THE COURT: Mr. John George, anything?

3 MR. GEORGE: No. We won't add anything new, but  
4 we'll join in with the other arguments as well.

5 THE COURT: All right.

6 And Mr. Marchese, did you have anything else?

7 MR. MARCHESE: Other than what I brought up already,  
8 no, Your Honor.

9 THE COURT: All right.

10 And Ms. Creegan, are you arguing on behalf of the  
11 Government?

12 MS. CREEGAN: I am, Your Honor.

13 THE COURT: Okay.

14 MS. CREEGAN: And I'll do my best to take them in  
15 reverse order.

16 As to Mr. Perez's requested instruction on  
17 circumstantial evidence, this is the law of the state of  
18 California. The Ninth Circuit has a model jury instruction  
19 which we've included in our stipulated instructions. I don't  
20 believe that this accurately states the federal law on the  
21 point and that the model instruction does accurately state it.  
22 So we would oppose the circumstantial evidence instruction.

23 Turning to the involuntary confessions proposal by  
24 Mr. Jackson, this is also adequately covered by an on point  
25 Ninth Circuit model jury instruction, 4.1, statement of

1 defendant. As this is written, I think this is very  
2 misleading. It includes a sentence at the end, "The jury  
3 should be cautioned that involuntary confessions or statements  
4 has been a leading cause of wrongful convictions." That would  
5 be like putting at the end of the elements of the count most  
6 people are convicted when charged with this. It's very  
7 suggestive and inappropriate to the jury. We believe this is  
8 more than adequately covered by rule -- by model instruction  
9 4.1.

10 Mr. Jackson also proposed chain of custody. I'm not  
11 able to tell, maybe Mr. Jackson can explain what he sees this  
12 as referring to. Our witnesses that have come in have  
13 testified that it fairly and accurately represents what they've  
14 seen or they can identify the video by distinct  
15 characteristics. I don't believe we have any items that have  
16 been submitted on chain of custody, so I'm not certain what he  
17 means for that to refer to.

18 THE COURT: Mr. Jackson, do you want to speak on  
19 that? Because there weren't any legal citations that were  
20 provided for that chain of custody instruction and there is no  
21 Ninth Circuit model jury instruction for chain of custody.

22 MR. JACKSON: That's true. There is no Ninth Circuit  
23 citation on this, but we had an issue in this case concerning  
24 the gaps in the chain of custody and it came up in the  
25 questioning, I think it was of the Flynn video, and we had a

1 witness who didn't have it in his custody the whole time and  
2 we -- he was cross-examined about it and when I raised that on  
3 cross-examination, the Court said it was a matter that could be  
4 raised in argument and I asked the Court to so instruct the  
5 jury that this is the kind of thing that the jury can give  
6 whatever weight it thinks is appropriate.

7           There wasn't a fully documented chain of custody on  
8 this one exhibit and because of that, I think the jury should  
9 give it whatever weight it thinks it deserves. And I think I  
10 can quote the Court's statement at the time when he was arguing  
11 this as my authority for this instruction. I don't have the  
12 transcript in front of me, but I do remember that issue came up  
13 when we were arguing the Flynn exhibit and I'll just submit it  
14 with that. It's an instruction I drafted to deal with the  
15 situation as it arose during trial.

16           THE COURT: All right. I do remind -- I do remember  
17 you arguing that issue and I believe my ruling was that this is  
18 not a matter where chain of custody is an issue because it was  
19 a video that the witness testified he was present during and  
20 that it accurately and fairly depicted what he saw when he was  
21 there and that there was no other indicia of unreliability, for  
22 example, as in a case where we have a blood draw or a urine  
23 draw or something like that where the chain of custody would be  
24 essential to know about. That's my recollection.

25           Ms. Creegan, did you want to add anything else on

1       that?

2               MS. CREEGAN: Only that so far as I understand, if  
3       this refers to the Flynn video, that was not submitted on chain  
4       of custody. Mr. Ellis is not a custodial witness. Therefore,  
5       we don't believe that instruction's appropriate.

6               MR. LEVENTHAL: Your Honor, I would just add to that  
7       argument that we also saw some, I guess, Channel 8 News and we  
8       had someone come in and say that they watched it on TV and I  
9       don't -- if the Court's going to base the decision on they were  
10      there and, you know, they saw what they saw and it may not be,  
11      we had someone come in from the FBI who just saw -- you know,  
12      looked at news programs that clearly was not there on  
13      April 12th, but yet was able to say that that's exactly what  
14      they saw. But it doesn't go to the bigger question on was  
15      that -- was what they saw real or was it done to -- you know,  
16      for the news, which is to make a profit and to, you know, put  
17      news out there that may not be what it is. And so I think  
18      that's where we go -- where Mr. Jackson's going, but I would  
19      suggest that that's -- validates his point.

20              MS. CREEGAN: I believe that those videos -- those  
21      pictures and images were authenticated by distinct  
22      characteristics, which is comparing characteristics in them to  
23      known photographs of April 12th, although defense is certainly  
24      free to argue that those are not reliable for one reason or  
25      another. That would not be a chain of custody issue because



1 again, they were not brought into court through a chain of  
2 custody of persons attesting to their authenticity. That's not  
3 the way in which they were authenticated.

4 THE COURT: All right.

5 MS. CREEGAN: And moving on to the lesser included  
6 offense of simple assault, although the misdemeanor offense is  
7 a lesser included offense, we don't believe it's appropriate to  
8 instruct the jury in this case.

9 Looking at *United States vs. Rivera-Alonzo*, 584 F.3d  
10 826 at 835, Ninth Circuit, 2009, that in a situation in which  
11 the Government's theory is solely as to the top level charge  
12 and there is no set of facts on which the jury can find the  
13 lesser included, it's not appropriate to instruct. We don't  
14 have a situation where there is a factual dispute as to whether  
15 the defendants had firearms or whether they committed an  
16 assault in some other form. If the jury doesn't find that  
17 there was an assault with firearms, then they should acquit.  
18 You know, to promote a compromised verdict on which there is no  
19 evidence to advance for a theory that there was some lesser  
20 form of assault would not be appropriate.

21 And I'm also looking it the *United States vs.*  
22 *Gividen*, G-i-v-i-d-e-n, 468 Fed. Appx. 744 at 744, 745, Ninth  
23 Circuit, 2012, in which a defendant drove a car at an officer  
24 and tried to get a lesser included offense instruction. The  
25 Ninth Circuit found that because the assault occurred with a

1 vehicle, which is a deadly and dangerous weapon, there was no  
2 factual basis on which to give a lesser included offense  
3 instruction.

4 THE COURT: All right. And did you want to argue on  
5 mere presence justification or self-defense, defense of others?

6 MS. CREEGAN: I would, Your Honor.

7 My arguments on mere presence are not long, just to  
8 reiterate, the Ninth Circuit, including the case which is cited  
9 in the commentary on the jury instruction, their holding  
10 consistently has been that if the Government presents more than  
11 mere presence, then the instruction is not appropriate. On  
12 every defendant we have presented significant evidence of  
13 pre-assault coordination, post-assault coordination explaining  
14 their --

15 THE COURT: Well, does it say it's not appropriate or  
16 does it just say it's not required? I think it just says it's  
17 not required.

18 MS. CREEGAN: It's unnecessary is the phrasing that I  
19 think is in *Negrete-Gonzalez*.

20 THE COURT: Unnecessary. You're right.

21 MS. CREEGAN: And this case we don't have any person  
22 where we've simply said they're present. In the cases where  
23 the instruction is given, a person is present at a drug deal or  
24 there's some argument that they must have been involved for  
25 them to be present there, but in this case we don't have any

1 defendant where we've made an argument that simply because they  
2 were on the bridge, or in the wash, they must have been  
3 involved with the conspiracy.

4 THE COURT: Justification?

5 MS. CREEGAN: Yes, Your Honor.

6 Justification is an extremely limited defense. It's  
7 a very, very rarely given instruction. It's usually given in  
8 the context of a Felon in Possession of a Firearm who claims  
9 that they took up the firearm for some immediate threat to  
10 themselves. Unlike self-defense, it is not phrased in terms of  
11 a reasonable mistake. In order to make a justification claim  
12 you have to be right, that you actually are under an unlawful  
13 and present threat of death. That's the risk that you take in  
14 this very limited defense. You have to have no reasonable  
15 legal alternative and you have to have not recklessly placed  
16 yourself in the situation.

17 I believe that the defendants would fail all of these  
18 tests. They were not under unlawful threat of death. Even if  
19 they claim that they believed that at the time, they were not  
20 under it. There were -- there were law enforcement officers  
21 that were asking people to disperse the area and ultimately  
22 retreated. The defendants recklessly placed themselves in the  
23 situation even though Metro and NHP law enforcement was  
24 present. They did not avail themselves of those avenues of  
25 potentially resolving the issue, and they absolutely had the

1 ability to do that and to seek a legal alternative. And the  
2 cases that deal with felon in possession all say that you have  
3 to try to get the protection of law enforcement or you have to  
4 reach out to law enforcement before you decide to arm yourself  
5 as a felon in possession and defend yourself. Here, we have  
6 defendants essentially walking straight by police officers and  
7 deciding to take up this course of action. We don't believe  
8 that under those circumstances they can avail themselves of a  
9 justification defense.

10 THE COURT: Okay. And then self-defense or defense  
11 of others under either the *Feola* or the *Span* instruction.

12 MS. CREEGAN: Yes, Your Honor.

13 We'd like to reiterate again that these instructions  
14 are both categorically unavailable to the defendants under the  
15 facts -- the uncontradicted, contested facts of the case.

16 Even as Mr. Parker's testimony elicits, he saw a  
17 large crowd, including horses; he, and people he knew with  
18 firearms, were in overwatch position; observed that group of  
19 people moving forward; and he claims that he heard first a  
20 threat to use chemicals, which would be a reasonable way to try  
21 to repel a large group descending on your position; they did  
22 not leave; they moved forward; and then he claims that he heard  
23 "you will be shot." Again, attempting to try to dispel and  
24 disperse the people. He claims that he heard the word  
25 "disperse." Under -- even under the facts as Mr. Parker

1 testifies to them, the crowd is the aggressor in this situation  
2 and Mr. Parker is covering the aggressor so that they can  
3 continue to move forward and advance on a much smaller group of  
4 people, even taking aside anything else about that situation.

5 Under that -- under those facts, the Ninth Circuit  
6 has consistently held that the aggressor cannot avail  
7 themselves of a self-defense theory and by taking a defense of  
8 others position, Mr. Parker stands in the shoes of the person  
9 that he's supposed to be protecting. That person was advancing  
10 on these people, ignoring the request to disperse, coming to  
11 them with superior numbers with horses that could trample them,  
12 and with at least, at a minimum, Mr. Parker would have the  
13 knowledge, himself and his friends, with firearms in an  
14 overwatch position. Under those facts, even assuming the jury  
15 believes everything that Mr. Parker has said, there is no  
16 self-defense instruction available.

17 Moving on specifically to *Feola*, the requirement of a  
18 reasonable mistake includes an objective requirement. In  
19 *Acosto-Sierra* the Ninth Circuit found that a person who  
20 suffered from paranoid schizophrenia could not argue that  
21 because they were afraid of the police officers and expected  
22 that they would do something, that would be sufficient to find  
23 that a reasonably objective person would make a mistake about  
24 the need to use force.

25 Under the circumstances, we don't have a reasonable

1 mistake about the need to use force. Although Mr. Parker has  
2 testified that he wasn't aware of the affinities of these  
3 people, he said that he knew what a BLM uniform looked like,  
4 that it was tan, that it had a patch. Individuals with that  
5 uniform were present. He said he knew that this was the  
6 compound where the cattle were, where the BLM had been. He  
7 said he could see the patrol vehicles. It's very, very clear  
8 that there's no facts that support the argument that he was  
9 mistaken as to who these were, and even less for the defendants  
10 which haven't taken the stand. There are no facts.  
11 Mr. Parker's sole fact is his claim that he didn't know who  
12 they were, but for the other defendants, there are no facts.  
13 These are uniformed officers, besides patrol cars, in the area  
14 where law enforcement is expected to be. Under those facts,  
15 there's not enough for a reasonable mistake of fact as to the  
16 identities of these persons.

17 And further, the defendant would have to believe that  
18 the force was necessary to defend against an immediate and  
19 unlawful use of force. Again, law enforcement officers from  
20 the state are available immediately. Instead of availing  
21 themselves of lawful interdiction of the situation, they  
22 immediately resort to vigilante justice which would not be a  
23 reasonable, least force necessary reaction to the situation.

24 MR. LEVENTHAL: Your Honor, I would note that Mr. --  
25 Mr. Drexler did, in fact, I guess through his Long Bow, testify

1 to that same set of facts that Ms. Creegan indicates that  
2 nobody else has. He indicated on his Long Bow that he showed  
3 up there and the sheriff told him they were leaving and for  
4 whatever they thought they were and when he got out, he parked,  
5 they were laughing and all of a sudden he heard what he heard  
6 and they didn't know who was down there. So, it's not just  
7 Mr. Parker; it's Mr. Drexler who sort of says the same story  
8 because that's what happened. And so, based on those set of  
9 facts, I believe a defense of others instruction should apply.

10 MS. CREEGAN: Well, again, that would have to be the  
11 least force necessary and it would have to be reasonable  
12 mistakes of facts, not unreasonable mistakes of facts. The  
13 public policy favors protecting law enforcement officers from  
14 being assaulted. It's not the case that any person who  
15 assaults a clearly marked officer can claim that they're  
16 entitled to the instruction solely on the fact that they say  
17 that they made a mistake. The mistake has to be reasonable and  
18 they have to have used the least force necessary to defend  
19 themselves.

20 And moving on to the *Span* instruction, again, these  
21 instructions should categorically not be available as  
22 aggressors, but certainly the height of excessive force being  
23 greater than normal force that you have a group of people  
24 advancing, being warned repeatedly, being begged to disperse  
25 and then first saying, we might deploy chemicals and then we

1 might -- you know, if you move forward, you'd be shot is the  
2 movements of an aggressor onto a much smaller force as that  
3 force attempts to dissuade them from coming forward. That's  
4 not excessive force. If this was a 1983 action, it would be  
5 dismissed immediately on summary judgment. It's not  
6 unreasonable for a small group of people, encountered with a  
7 much larger numerically superior group, with horses, with  
8 overwatch, to try to get them to leave, to tell them disperse  
9 or else, we will, you know -- to point a gun at them, that  
10 would be completely reasonable in this situation.

11 So, as a matter of law, the facts as the defense has  
12 alleged them to be are not sufficient to make out a *Span*  
13 instruction.

14 MR. LEVENTHAL: And I see the factual -- the factual  
15 allegations a little bit different in that the word "shoot" was  
16 used -- "they will shoot" was used when Mr. Lynch was in the  
17 wash and came back and told the protestors, the prayer group.  
18 We have that on video and clearly nobody was on the freeways at  
19 that point. So, to suggest that, you know, the only reason  
20 that the BLM said "we're going to shoot" is because the  
21 protestors continued on -- advancing, that's completely wrong.  
22 That's not what the facts came out and said. The video shows  
23 Flinch [sic] in the middle, nobody on the bridge, Flinch [sic]  
24 going back to tell the prayer group that, in fact, they were  
25 going to shoot, and then the word got back up and then you see



1 people starting to come in and starting to move in on the  
2 bridge. So, clearly, I think that's objectively and  
3 subjectively reasonable that my client believed, before they --  
4 that group even moved, that they were going to be shot. And so  
5 it wasn't the movement of the group; Flinch [sic] came back and  
6 said they were going to be shot, and that was before that group  
7 even moved, and that's on the video, on his video when he went  
8 back, Your Honor.

9           So, I disagree with the Government's factual  
10 allegations or how they -- and I understand what they're  
11 saying, but it's not -- it's just not true. It wasn't, okay,  
12 you know, you're disobeying a court order and then the  
13 movement; it was they're going to shoot and then the word got  
14 back before anybody even moved, before the horses even got  
15 there, before anybody got there the word "shoot," "you will" --  
16 "they're going to shoot us," was mentioned over and over before  
17 anybody made a movement towards the BLM.

18           MS. CREEGAN: Those are mere words. Words are not  
19 use of force. I assume the use of force that the defense is  
20 talking about is the pointing of firearms, which there is no  
21 evidence of that occurring until there are people in the wash  
22 moving forward.

23           MR. LEVENTHAL: There's -- I disagree. Lynch's video  
24 clearly has people pointing and I've pointed that out. There  
25 was at least two -- there was a stacking formation before

1 anybody got into the wash when Lynch was out there. You see it  
2 on his video before the horses got out there. So, that's --  
3 that's not true. There was clearly pointing of BLM at the  
4 prayer group before anybody even got on the bridge or  
5 underneath, and that's in his video. That's the facts.

6 MS. CREEGAN: Well, I don't agree with that. The  
7 prayer group is the 11:36. There's not evidence of any  
8 pointing until 11:58.

9 MR. LEVENTHAL: I disagree with that.

10 MS. CREEGAN: But even so, it would still be a  
11 numerically superior group, with overwatch positions, with  
12 horses descending on a smaller group.

13 MR. LEVENTHAL: Well, at the time that the BLM was  
14 pointing at the prayer group, it was not a superior group.  
15 There was nobody on a high point, except for the BLM which were  
16 up on a mesa. They were on the high point actually, and they  
17 had far more superior power and they were pointing guns, in a  
18 video that were watched, at a prayer group that were sitting.  
19 And that's what's clear from Mr. Lynch's video, and not the  
20 other way around.

21 MS. CREEGAN: Even if that were to be the case, they  
22 would have to -- that would mean that they would have had to  
23 have broken off their assault of the officers as soon as those  
24 facts changed. They didn't. They continued to assault them  
25 until after 12:30, forcing them to leave as the group advanced

1 forward. So, that's not the least force necessary if they  
2 continue to assault them while this group is moving forward and  
3 advancing on them. That wouldn't be just a justification for  
4 assaulting these officers for 40 minutes, 45 minutes.

5 THE COURT: All right. Anything else that anyone  
6 wants to add on the record?

7 MR. TANASI: Your Honor, if I may, just on the mere  
8 presence and lesser included --

9 THE COURT: Sure.

10 MR. TANASI: -- go back to that quickly.

11 With respect to the mere presence, from what I  
12 understand, the Government's position is that they've -- you  
13 know, none of their case and nothing that they've presented  
14 demonstrates that Mr. Stewart was merely present and there was  
15 some, you know, pre-planning, some pre-planned assault. And I  
16 would say that Mr. Stewart's Facebook, which is Mr. Stewart's  
17 voice essentially in this case, says nothing to that effect.  
18 There's no pre-planned assault. There's no pre-planning of any  
19 kind of hostile takeover. It's a pre-planned protest. And so,  
20 the mere presence instruction is a defense theory instruction  
21 that I think is clearly available to Mr. Stewart in this case.

22 And then with respect to the lesser included, it's  
23 not just that the Government has to prove that he was holding a  
24 weapon; it's that he used a weapon. And that's even what needs  
25 to occur with respect to the 924(c) count. When we -- we go

1 that far, where the Government actually has to prove in order  
2 to get the 924(c) count, that he used or carried, and  
3 potentially brandished in order to satisfy that count. So, the  
4 same theory and the same rationale applies to why the lesser  
5 included instruction is viable in this case because it's not  
6 just whether he held a gun. In order for the simple assault to  
7 go from simple misdemeanor assault to felony assault the  
8 Government has to prove, through the elements of the statute as  
9 outlined, that he used it. He used it. It's -- it's not just  
10 held it. And so, from that theory I think the lesser included  
11 defense is viable as well.

12 MS. CREEGAN: I think Mr. Tanasi is conflating the  
13 elements of 924(c) and the elements of the assault, which are  
14 separate. In order to have an assault, it just has to create a  
15 reasonable apprehension of the other person from a presence of  
16 a deadly and dangerous weapon, which a firearm, by law, is  
17 included in that definition.

18 And as to the argument there's nothing in his  
19 Facebook describing the plan, Exhibit 269, Mr. Stewart posts on  
20 April 12th, "First they said they were going to release  
21 everything and leave. Then they held the gates to Gold Butte  
22 and threatened us with chemicals. Then we pushed forward and  
23 they had to back off. They are releasing the cows now. BLM is  
24 leaving."

25 So, we have -- we do have statements, including

1 statements on the day, that show the presence of a plan. We  
2 moved forward. They had to back off.

3 MR. TANASI: And again, Your Honor, these are jury  
4 questions. A plan to push forward. It's not a plan to push  
5 forward and assault officers. It's a plan to protest and push  
6 forward. Again, whether the jury believes that theory or not  
7 is for the jury to decide and that's why I think the mere  
8 presence is completely appropriate. Because without having  
9 that, it takes away that part of the defense theory.

10 MR. JACKSON: Your Honor, could I be heard for just a  
11 minute?

12 I mean, the whole issue in this case is whether you  
13 can go to a protest with a gun and not be charged with  
14 committing a crime of violence or assault against any police  
15 officers or law enforcement agents that are there at the  
16 protest. The jury will have to decide, each person whether  
17 they went there with the specific intent to commit a crime just  
18 because they had a weapon. I don't think -- you know, a lot of  
19 the law enforcement officers testified that, no, that was the  
20 case, they were in fear or that they believed that that was the  
21 intent of the individuals that were there, but that will be a  
22 jury question. And I think our defense will be that's for the  
23 jury to decide what the specific intent of each individual was.

24 Now, the jury's going to have to consider all the  
25 evidence, but I think they should be properly instructed that

1 it's their decision, not just a presumption of guilt that  
2 because they showed up at the demonstration site with weapons,  
3 that they immediately should be found guilty of these charges.  
4 And that's -- you know, if we structure the giving of  
5 instructions a certain way, they'll almost be compelled to find  
6 guilt. If we give them fair instructions that don't presume  
7 guilt, namely, that they can be merely present at the scene  
8 with a weapon and that that doesn't mean that they're guilty, I  
9 think that the jury will reach a proper decision; guilt or  
10 innocence. They will look at all the factors and decide  
11 whether or not an individual had criminal intent when they went  
12 forward, or when they went sideways, or when they pushed  
13 forward, or when they did any act that might be considered an  
14 assault. That's all we're asking for.

15 THE COURT: Anyone else?

16 All right. Well, the standard in order to be  
17 entitled to a instruction on a theory of the defense case is  
18 that the theory has to be legally cognizable and there needs to  
19 be evidence upon which the jury could rationally find for the  
20 defendant. This is pursuant to *United States v. Morton*, Ninth  
21 Circuit, '93 case. "A mere scintilla of evidence supporting  
22 the defendant's theory, however, is not sufficient to warrant a  
23 defense instruction," and there I'm quoting from *U.S. v.*  
24 *Jackson*, Ninth Circuit, '84 case.

25 So, as to self-defense or defense of others, we do

1 have, as previously discussed in the context of Title 18,  
2 United States Code, Section 111, two forms of self-defense  
3 recognized by the Ninth Circuit; the first one is the -- what I  
4 keep referring to as the *Feola* because it's based on *United*  
5 *States v. Feola*, United States, 1975 case, which is the  
6 ignorance of the official status of the person assaulted, and  
7 then the second option for self-defense or defense of others is  
8 *United States v. Span*, which is a Ninth Circuit, '96 case, and  
9 that is for an excessive force defense.

10 And so, starting first with the *Feola* mistaken  
11 identity defense. "The defense is premised on the defendant's  
12 honest mistake of fact or lack of knowledge that the victim was  
13 a law enforcement officer," and I'm quoting from *United States*  
14 *v. Morton*, Ninth Circuit, '93 case. "The defense consists of,"  
15 number one, "a mistake or lack of knowledge as to authority,"  
16 and number two, "a reasonable belief that force was necessary  
17 to defend against an immediate use of unlawful force," and  
18 number three, "the use of no more force than appears necessary,  
19 reasonably necessary."

20 In this case, the record belies the defendants'  
21 contention that they did not know the identity of BLM or the  
22 National Park agents or any other federal agents in the wash.  
23 Reviewing the evidence to determine whether a mere scintilla of  
24 evidence exists on this point, the Court finds that the  
25 defendant had specific knowledge before the confrontation of

1 the BLM's presence through social media posts.

2 Moreover, the defendants confirmed in the Long Bow  
3 interviews that they went to Nevada to stop federal government  
4 overreach, and the statements are corroborated by the defense  
5 witnesses Mr. Bushman and Ms. Arnett. In the Long Bow  
6 interviews, the defendants state that they went to Bunkerville  
7 to stand up to the BLM, or for standing up to federal  
8 overreach.

9 The defendants prepared to meet the BLM by arming and  
10 donning battle-type gear, which, even a witness for the  
11 defense, Mr. Bushman agreed was war-like, and even if not every  
12 defendant was aware before their arrival of the BLM's presence,  
13 the record demonstrates beyond a doubt that by the time the  
14 defendants arrived in the wash, they were aware of the agents'  
15 identity as federal law enforcement officers.

16 The crowds wore buttons which read "BLM" in black  
17 letters on a white background with a red circle and a slash  
18 going through it.

19 On the stage, at the April 12th rally, in the  
20 morning, Cliven Bundy specifically referenced the National Park  
21 Service to Sheriff Gillespie, among his conditions, was that  
22 Gillespie discharge the police service -- the Park Service, and  
23 Gillespie stated on stage that the next steps were for the BLM  
24 to remove safely its remaining assets.

25 Furthermore, the agents identified themselves over a



1 loudspeaker and although a reasonable juror could doubt that  
2 every individual in the wash heard this announcement, a  
3 reasonable juror could not overlook the visible indicators of  
4 the agents' identity. The agents' vehicles included light  
5 bars, consistent with law enforcement, and the National Park  
6 Service had the Nevada Park Service emblem and the words  
7 "ranger" in all caps on the side, visible to the individuals in  
8 the wash. The agents' gear included military-style helmets and  
9 bullet resistant vests, which is not the garb of unidentified  
10 assailants.

11 While the defendants have introduced some evidence of  
12 confusion as to whether the agents were from the BLM or the  
13 National Park Service or the United States military, the  
14 instruction merely requires evidence demonstrating a mistake or  
15 lack of knowledge as to authority; that the defendants may not  
16 have known the exact federal agency from which the authority is  
17 derived is immaterial. As in the *United States v. Jackson*,  
18 Ninth Circuit, 1984 case, noting that the witness' testimony,  
19 that they heard "no police warning," is not evidence that the  
20 officers did not identify themselves.

21 The only evidence here that I can perceive in favor  
22 of this instruction is testimony that the witnesses were  
23 confused because Gillespie said on the stage that the BLM had  
24 left. However, I do not find this belief reasonable because  
25 Gillespie never said that the BLM had left. He actually said

1 the BLM needed to safely evacuate its remaining assets.

2 Weighed against the overwhelming evidence to the contrary, this  
3 testimony does not rise to more than a scintilla of evidence as  
4 it is insufficient for the jury to rationally sustain this  
5 defense, again, pursuant to *Jackson*, Ninth Circuit, 1984 case.

6 Viewing this evidence in the light most favorable to  
7 the defendants, I am not persuaded that a reasonable jury could  
8 harbor a reasonable doubt that the defendants did not know the  
9 agents' identity. I will therefore not provide the  
10 instruction -- this jury instruction, as in the *U.S. v. Jackson*  
11 case affirming the District Court's denial of the self-defense  
12 instruction, where none of the testimony on which the defendant  
13 relied was sufficient to support an inference that the  
14 defendant was unaware of the identity of the officers.

15 As to excessive force, pursuant to *United States v.*  
16 *Span*, Ninth Circuit, 1992 case, the Ninth Circuit recognized  
17 that in rare cases an individual may make out an affirmative  
18 defense of self-defense against a federal law enforcement  
19 official who uses excessive force. To do so, a defendant must  
20 offer evidence to show, first, a reasonable belief that the use  
21 of force was necessary to defend himself or another against the  
22 immediate use of unlawful force, and number two, that the use  
23 of no more force than was reasonably necessary in the  
24 circumstances.

25 So preliminarily, I find that the record belies the

1 defendants' contention that the agents used excessive force and  
2 are therefore not entitled to the instruction.

3 As in *Martinez-Garcia*, which the Ninth Circuit, 2013  
4 case, there was not sufficient evidence from which the jury  
5 could have concluded that the agent in that particular case  
6 used excessive force and therefore the defendant was not  
7 entitled to that defense instruction.

8 Here, the defendants do not clearly state their  
9 argument for how the agents used excessive force. As far as I  
10 can gather, the defendants argue that the following actions by  
11 the agents amount to excessive force: Their militarization of  
12 Bunkerville; their war-like garb; their weapons; and primarily  
13 their raising of guns at the individuals in the wash. However,  
14 this evidence does not support any reasonable inference that  
15 these actions constituted excessive force by the agents in this  
16 particular situation under these circumstances.

17 Agent after agent testified that the BLM and the Park  
18 Service had received threats regarding the impoundment of  
19 cattle. The agents testified that after a series of  
20 contractors, who attempted to impound the cattle, were scared  
21 off, the agents purpose leading up to April 12th was to protect  
22 the contractors in their renewed attempt to impound the cattle.  
23 Video and pictures of the protestors show them carrying a  
24 shocking amount of weapons for a supposedly peaceful protest  
25 and at various times pointing the weapons towards the agents.

1 In this tense atmosphere, a mere 30 agents were confronted by a  
2 crowd of 400 angry and non-compliant and advancing individuals,  
3 more than 60 of which were armed, 40 were on horseback, and at  
4 least two snipers were concealed on surrounding bridges.

5 The defendants have not introduced any evidence that  
6 would suggest that the agents' actions constituted an excessive  
7 use of force in the circumstances. This is particularly true  
8 here where the agents made no contact with defendants. The  
9 agents did not even attempt to seize or arrest the protestors  
10 and I therefore find that no reasonable jury could conclude  
11 that the agents' actions constituted excessive force.

12 Even if I were to conclude otherwise, the defendants  
13 have not introduced any evidence that their response to the  
14 agents' actions was objectively reasonable under *Acosta-Sierra*,  
15 Ninth Circuit, 2012.

16 To demonstrate the objective reasonableness of their  
17 actions, the defendants have introduced evidence of the  
18 protestors' fear in the wash and this testimony falls short of  
19 showing objective reasonableness as the witnesses themselves  
20 were not only not objective, but also biased. Each witness  
21 stated that they came to Bunkerville to support the Bundys or  
22 to stop federal overreach, and in addition, while defendants  
23 and those present may have feared for their lives during the  
24 incident, that fear alone does not warrant a self-defense  
25 instruction. Fear, in response to law enforcement, is

1 commonplace, but does not entitle citizens to take up weapons  
2 in response to agents in the lawful execution of their duties.

3 Defendants' theory that their actions were  
4 objectively reasonable also appears premised on their claim  
5 that they thought the BLM had left and therefore did not know  
6 who the individuals pointing guns at them were. And as I've  
7 discussed previously, these beliefs were not reasonable in  
8 light of the abundance of evidence that the defendants were  
9 aware that, at a minimum, the agents were federal officers  
10 impounding cattle as part of a federal operation.

11 Furthermore, the social media evidence and Long Bow  
12 interviews demonstrate that the defendants entered the wash on  
13 April 12th to confront the BLM. The fact that defendants  
14 donned battle dress and carried weapons to the wash is  
15 inconsistent with their statement that they merely entered the  
16 wash to watch the cows come home or to protect the unarmed  
17 women and children. Instead, the defendants' behaviors are  
18 consistent with Cliven Bundy's call that the range war has  
19 begun and his encouragement during the April 12th rally to  
20 secure the cattle by any means necessary.

21 "An individual" -- and I'm quoting from *U.S. v.*  
22 *Branch*, Fifth Circuit case from 1996 -- "An individual who  
23 dresses for combat, retrieves an assault rifle, and proceeds to  
24 confront government agents executing a lawful warrant is not  
25 entitled to claim the benefits of self-defense when the

1 hoped-for confrontation with the agent occurs. An individual  
2 who is the attacker cannot make out a claim of self-defense as  
3 a justification for an assault when there were other  
4 non-violent remedies available."

5 The defendants have failed to introduce more than a  
6 mere scintilla of evidence that their actions were objectively  
7 reasonable and the Court therefore declines to give this  
8 version of the self-defense instruction.

9 Moving on to justification. "The defendants must  
10 establish four elements in order to make out a justification  
11 defense; number one, that he was under unlawful and present  
12 threat of death or serious bodily injury; number two, that he  
13 did not recklessly place himself in a situation where he would  
14 be forced to engage in criminal conduct; number three, that he  
15 had no reasonable legal alternative; and number four, that  
16 there was a direct causal relationship between the criminal  
17 action and the avoidance of the threatened harm." This is  
18 under *U.S. v. Lemon*, Ninth Circuit, 1987.

19 Here, as explained previously, any threat to the  
20 defendants was not unlawful. Law enforcement officers were  
21 executing their duties in good faith and cannot be unlawful.

22 For the second factor, there had been no evidence  
23 that defendants did not recklessly place themselves in this  
24 confrontational situation. The only evidence presented  
25 demonstrated that the BLM was guarding the compound, where they

1 had been for days, and at Cliven Bundy's rally on 4-12, he told  
2 everyone present to go to the Toquop Wash and get his cows and  
3 in response to this statement, defendants and the rest of the  
4 mob went to Toquop Wash area, including the northbound I-15  
5 bridge, and confronted the BLM and the National Park Service  
6 officers stationed there guarding the compound. Some of the  
7 defendants already had their firearm and gear at the rally, but  
8 the rest retrieved these items before getting to the wash area.  
9 By going to the wash area, defendants recklessly placed  
10 themselves in the situation negating Element 2.

11 Further, defendants had reasonable legal alternatives  
12 to take their firearms to the wash area to intimidate the  
13 federal law enforcement officers and once there, they could  
14 have left at any time and at no point was their egress option  
15 limited. As such, the Court finds that defendants have failed  
16 to present any evidence to warrant the defense instruction of  
17 justification.

18 As to the mere presence defense, "If the Government's  
19 case" -- and I'm citing here from *Negrete-Gonzalez*, Ninth  
20 Circuit, '92 case, "If the Government's case is based on more  
21 than just a defendant's presence and the jury is properly  
22 instructed on all elements of the crime, then a mere presence  
23 instruction is unnecessary." And in that case the Ninth  
24 Circuit's also citing to the *Chambers* case, which is an earlier  
25 Ninth Circuit case from 1990.

1           Here, the Court finds the defendants are entitled to  
2 this instruction. The defendants' theory of the case rests on  
3 the proposition that they were merely present during the  
4 standoff. The Court finds that defendants have presented more  
5 than a scintilla of evidence that the Government's case against  
6 the defendants could rest primarily on their presence and that  
7 a reasonable juror could find as such.

8           So as to that point, while I agree that the  
9 instruction is not required, it -- I don't agree that it's  
10 inappropriate to give. I think it is discretionary and the  
11 Court does exercise its discretion in this case to provide that  
12 instruction.

13           As to the lesser included offense, which is Number  
14 1793 on the document -- on the docket, rather, "An instruction  
15 on a lesser included offense is warranted if, number one, the  
16 elements of the lesser offense are a subset of the elements of  
17 the charged offense, and number two, if the evidence would  
18 permit a jury, rationally, to find guilt of the lesser offense  
19 and acquit of the greater," and that's citing from *Arnt*,  
20 *A-r-n-t*, Ninth Circuit, 2007 case.

21           "Simple assault is a lesser included offense of  
22 felony assault on a federal officer under Title 18 of the  
23 United States Code, Section 111," citing to *Rivera-Alonzo*,  
24 Ninth Circuit, 2009. "The Ninth Circuit previously held that  
25 Section 111 defines three separate offenses; number one,



1 assaults that do not involve physical contact" -- and those are  
2 punishable for up to 1 year -- "number two, assaults that do  
3 involve physical contact" -- and those are the ones that are  
4 punishable up to 8 years -- "and then number three, assaults  
5 that involve a deadly or dangerous weapon or bodily injury" --  
6 and those are the ones that are punishable by up to 20 years,  
7 and I'm citing from *Chapman*, Ninth Circuit, 2008.

8 In *Rivera-Alonzo*, in that case the Court found that  
9 the defendant was not entitled to the lesser included offense  
10 instruction under the circumstances of the case because the  
11 jury could not have convicted a defendant of the lesser  
12 included offense without finding the elements that would  
13 convert the lesser offense to the greater. "An assault coupled  
14 with the presence of physical contact or similar aggravating  
15 factor, such as the attempt to commit murder or a serious  
16 felony, is not simple," cites *Chapman*.

17 Here, the assault, coupled with the deadly weapons,  
18 makes it not a simple assault. Based on the record, the Court  
19 finds that no rational juror could convict defendants of  
20 assault here and find that the defendants did not have a deadly  
21 weapon. As such, the Court finds that the defendants are not  
22 entitled to the lesser included offense of simple assault.

23 As to the involuntary confession jury instruction  
24 proposed, the cited cases on that instruction do not support  
25 providing the involuntarily confession instruction. *Crane v.*

1     *Kentucky* is the first one cited, which only discusses the  
2     admissibility of evidence, not a jury instruction. It  
3     specifically states that evidence about the manner in which a  
4     confession was obtained is relevant to its reliability and  
5     credibility. And so, the evidence of such evidence is  
6     admissible as to its reliability and credibility. It doesn't  
7     mention -- it doesn't -- doesn't -- it's not in regard to the  
8     voluntariness or whether a jury instruction of voluntariness  
9     must be given and in this case the defense was able to ask  
10    questions and elicit information regarding the manner in which  
11    the confession was obtained so that the jury can determine its  
12    reliability and credibility.

13             *Henry v. Kernan* was the other case that was cited and  
14    it's also about admissibility of evidence, not jury  
15    instructions, and the context of whether a confession which was  
16    obtained in that case, in violation of *Miranda*, could it then  
17    be used for impeachment when the defense took the stand. The  
18    Court found that it depended on whether or not the confession  
19    was voluntary. So the voluntariness of the confession was  
20    determined by the Court, not by the jury, and the Court  
21    determined that it was not voluntary and therefore not  
22    admissible for impeachment. But this was --- this case had  
23    nothing to do with a jury instruction.

24             *Scheckloth v. Bustamonte* is the other case that's  
25    cited and that's about a consent to search and does not seem to

1     apply in this case. Certainly not about this jury instruction,  
2     and then *United States v. Bautista-Avila* was the last case that  
3     was cited on that proffered instruction, which affirmed the  
4     admissibility of a confession, and again, did not discuss jury  
5     instructions.

6             So the Court finds that the involuntary confession  
7     instruction need not be given and the Court declines to give  
8     that instruction.

9             The chain of custody instruction, no legal citations  
10    were provided for that jury instruction, but there is no chain  
11    of custody Ninth Circuit model jury instruction and  
12    additionally, there do not appear to be any cases supporting  
13    such an instruction. For example, *United States v. Gaensel*,  
14    G-a-e-n-s-e-l, Ninth Circuit, 1981 case, although only  
15    mentioned briefly, "The Ninth Circuit upheld the District  
16    Court's refusal to give the proposed chain of custody jury  
17    instruction."

18            And then as to the circumstantial evidence  
19    instruction proffered, first, there is no additional  
20    circumstantial evidence or to a reasonable theory, Ninth  
21    Circuit model jury instruction, other than the direct and  
22    circumstantial evidence instruction that the Court has already  
23    said that it is going to give. The cited cases do not support  
24    providing this proposed new jury instruction.

25            In *United States v. James*, the Ninth Circuit found

1 that the District Court gave a jury instruction on direct and  
2 circumstantial evidence and another one on reasonable doubt and  
3 so it was not necessary to give the defendant's desired  
4 circumstantial evidence jury instruction. *James* is Ninth  
5 Circuit, 1978 case. "Neither party, including a criminal  
6 defendant, may insist on any particular language for this  
7 defense."

8 And in *Hooper v. State*, which is a 1979 State of  
9 Nevada case, the Nevada Supreme Court found that it was not  
10 error to decline to give this instruction so long as reasonable  
11 doubt instructions were given. So it's not even a case that's  
12 used in this state -- or not instruction used in this state.

13 In the *People v. Merkouris*, M-e-r-k-o-u-r-i-s -- this  
14 was cited in the jury instruction. It's a 1956 California  
15 Supreme Court case. There's no reason for the Court to follow  
16 this particular California Supreme Court case and the Ninth  
17 Circuit has neither adopted it nor committed -- commented on it  
18 as being useful or necessary.

19 So that's the Court ruling on the instructions. I  
20 will provide to you probably -- it's only 2:30 -- probably  
21 before the end of the day, the final jury instruction formatted  
22 so that you can have that tomorrow while you prepare your  
23 closing arguments and they'll be numbered so that you can have  
24 that and be able to refer to them by either number or title,  
25 but you'll have the exact -- if you want to blow it up or show

1 it on the monitor, you'll have that available to you.

2 Mr. Marchese, I did forget to ask you -- I got  
3 confused because Mr. Leventhal was talking about forfeiture,  
4 but actually Mr. Leventhal's client's not charged in the  
5 forfeiture; it was Mr. Marchese's who's charged with the  
6 forfeiture count. So I just want to clarify and make sure on  
7 the record that you did not want me to include an instruction  
8 for the jury to find as to that forfeiture count.

9 MR. MARCHESE: You do not have to, Your Honor.

10 THE COURT: Okay. Thank you.

11 All right. So we've told the jury that they are to  
12 return on Wednesday morning at 8:30 a.m. At that time I will  
13 read to them the jury instructions. Depending how long that  
14 takes, we might take a bathroom break after that and then we'll  
15 go into summation, first by the Government, and then is there a  
16 particular order for the defense that you want me to call or  
17 are you going to --

18 MR. MARCHESE: I think we're still working it out,  
19 Your Honor --

20 THE COURT: Okay.

21 MR. MARCHESE: -- but we'll let Your Honor know  
22 before the jury enters the room.

23 THE COURT: Okay. And . . . again, Mr. Engel, I've  
24 stated that I'm going to allow you to argue for yourself. Just  
25 please be very careful. I could -- cannot urge you enough

1 or -- or -- you know, many times, I could just -- I could argue  
2 that this is probably a mistake, but I think that it's  
3 appropriate to permit you to argue so long as you're aware that  
4 there are certain things that can't be stated in closing  
5 arguments and you need to go through that with Mr. John George  
6 to make sure that you understand that, just as if you were an  
7 attorney. I cannot hold you to a different standard as an  
8 attorney when it comes to those objections.

9 I also recommend that you have a Plan B so just in  
10 case you do get befuddled and you cannot go forward and finish  
11 closing argument on your own, that you at least can have  
12 something that Mr. George can read for you, even if he has to  
13 quickly reword it to make it appropriate. I can only imagine  
14 it would be easier for Mr. George, on an objection of phrasing,  
15 that he could rephrase it so that at least the nuts and bolts  
16 of what you're trying to say will at least be heard by the jury  
17 if you're using inartful, inappropriate, objectionable  
18 language.

19 All right. So I think -- and so, I guess, you know,  
20 on Thursday we'll just take the bathroom breaks as needed.  
21 It's going to be long and I know that you all don't mean to be  
22 repetitive, you have to say what you have to say, and even if  
23 we see the same picture or document over and over again, if  
24 that's what it needs to be, that's what it needs to be. Let me  
25 know if you think we're not taking enough bathroom breaks and

1 I'll take more breaks if that's what we need. I know that  
2 other Courts don't necessarily take the bathroom break but take  
3 a stretch break so everyone can kind of stand up and then sit  
4 back down again. So if you want do that, that's fine too. I'm  
5 happy to go along with that as well just to make sure that  
6 everybody's paying attention.

7 All right. So with that, I think that concludes all  
8 the information. We'll go ahead and see you back here at  
9 8:30 a.m.

10 Did you get a chance to go -- look through all the  
11 evidence that's in the binders for the jury or do you still  
12 need time?

13 MR. MYHRE: Your Honor, that was one of my questions  
14 and I also think, and the Court may have touched on this, I  
15 just missed it. We had discussed about filing separately a  
16 redacted or sanitized version of the Indictment.

17 THE COURT: Yes, and that was filed.

18 MR. MYHRE: Yes. So, is that acceptable to the  
19 Court? I believe --

20 THE COURT: Yes.

21 MR. MYHRE: Is this what the Court intends to submit?

22 THE COURT: It was acceptable to me.

23 Does the defense have any objection to it? It  
24 redacted all the information that was objected to.

25 MR. LEVENTHAL: No -- no objection.

1 MR. TANASI: No objection, Your Honor.

2 MR. MYHRE: And, Your Honor, in terms of the  
3 exhibits, one exhibit that the Government has was 457. There  
4 was at -- during the testimony, we had, at slide 49,  
5 interlineated to reflect Exhibit 366 as the source of that. I  
6 looked at the exhibit that was at the witness stand and that  
7 was not interlineated. I checked with defense counsel. They  
8 don't have an objection if we substitute in to correct that  
9 reference to reflect Exhibit 366, by 79. So I have new 457  
10 copies for everyone so that they can see that that correction  
11 is made. So, I just wanted to be able to make that  
12 substitution to that one slide.

13 THE COURT: Is that right? There's no objection to  
14 that substitution?

15 MR. LEVENTHAL: No objection.

16 MR. TANASI: That's correct, Your Honor. No  
17 objection.

18 MR. LEVENTHAL: Mr. Myhre went through that with us.

19 THE COURT: Okay.

20 MR. MYHRE: And then, Your Honor, just in terms of  
21 general housekeeping. Is it the Court's intention that the  
22 exhibits in paper form are going back or are they going to be  
23 in electronic form or how . . .

24 THE COURT: The binders will go back. I realize that  
25 some of the binders have disks.



1           MR. MYHRE: Yes, Your Honor. Right. We had -- we  
2 had -- where we had introduced videos, we have those videos put  
3 on to separate disks that were marked in the exhibit book as  
4 well. My understanding is, is after -- if the jury wishes to  
5 see a video, it be played in open court is my understanding,  
6 so . . .

7           THE COURT: I think that's what we'll have to do.

8           MR. MYHRE: Okay.

9           THE COURT: We -- we do have a rolling player so that  
10 they can watch it if they need to. If you -- if the parties  
11 agree to it, depending on what kind of statement it is. If  
12 it's a statement -- if -- if the video contains a statement by  
13 the defense, then the defense has a right to be here while it's  
14 played for the jury. The defense can waive that presence if  
15 they don't want to, but they have that right. If the video  
16 that they want to watch does not contain statements of the  
17 defendant, then they can watch just like they can view any of  
18 the photographs that -- that are in there, but any time that a  
19 jury question comes -- you know, I instruct them about how to  
20 ask a question, if they do have a question. As soon as I get a  
21 jury question, the courtroom deputy will contact you all  
22 immediately and then that will give you some time to get here  
23 and then we'll discuss it first before we respond so that if  
24 there's three different choices on how to respond and we can't  
25 get an agreement as to how to respond, you'll have at least an

1 opportunity to place that on the record. And then usually, if  
2 possible, if it's a short enough response, I'll just go ahead  
3 and write the response in red on the jury note, make copies of  
4 it so you all have it, and then that's sent back to the jury.  
5 If the response is a little more complicated than that, then  
6 sometimes we need to write it out and have them come in and  
7 provide them with the instruction. So, we'll know if they --  
8 if they want to watch a video, one of the videos.

9 I guess, does that answer your question?

10 MR. MYHRE: Yes, Your Honor. I just wondered if we  
11 had to do anything to change the present format of the disks as  
12 they exist now in the binders. I didn't know if they were  
13 going to be allowed to go back to the jury -- in the jury  
14 deliberation room or if they had to be segregated and separated  
15 out.

16 THE COURT: No. We do -- we do have the juror  
17 system. We do believe that it's working properly now. It  
18 wasn't working a hundred percent properly before because it  
19 wasn't able to record what was being played, which is a key  
20 thing when you all have a large video but agree that only a  
21 portion of it is admissible and that's the portion that you  
22 play. So, now we can record that and make a separate recording  
23 of just what was played in court, which is the only piece  
24 that's admissible, but we weren't sure we were going to have  
25 that ready when the trial started. So, we have not been

1 recording and the evidence that's in the books is what's being  
2 provided to the jury, at least in this trial.

3 MR. MYHRE: Understood, Your Honor.

4 THE COURT: Until we're a little more comfortable  
5 that everything is working properly with the juror system.

6 MR. MYHRE: Those are all the points I had,  
7 Your Honor.

8 THE COURT: Okay.

9 MR. LEVENTHAL: Your Honor --

10 THE COURT: Yes.

11 MR. LEVENTHAL: -- I have two things. I apologize.  
12 One, I assume that Mr. -- and all the defendants will be  
13 transported here each and every day from here on out. Is  
14 that -- would that be correct to say?

15 THE COURT: I don't know exactly where they'll be  
16 held. But if there is a question, then the attorneys and the  
17 defense and the defense -- the defendants have a right to be  
18 here unless the attorneys waive their presence, but absolutely  
19 they would be transported and we would not address the jury  
20 question until they were transported.

21 Is that your question?

22 MR. LEVENTHAL: So not -- not to say -- no. No. My  
23 question is not where they're going to be housed at, it's just  
24 that they'll be available here in case the jury wants to watch  
25 a video and they want to be a part of it, they have that right

1 to be there and so, I would assume that they're going to be  
2 here every -- well, not where they're housed, but they'll be  
3 close by in proximity to the -- to the courthouse in case a  
4 verdict comes back or somebody wants to -- or the jurors want  
5 to view video and they want to be a part of that.

6 THE COURT: You know, "close by" is a relative term.

7 MR. LEVENTHAL: Yes.

8 THE COURT: I don't know if they're going to be on  
9 the second floor or in some other, you know, county facility,  
10 but they will need to be here if we are to address any jury  
11 questions, unless the attorneys waive their presence.

12 MR. LEVENTHAL: Very good.

13 THE COURT: So we wouldn't be going forward until  
14 they're here, however long it takes.

15 MR. LEVENTHAL: Okay.

16 THE COURT: Whether it's --

17 MR. LEVENTHAL: You've answered my question.

18 THE COURT: Whether they're downstairs or 10 minutes  
19 away or 30 minutes away, I won't know.

20 MR. LEVENTHAL: And for purposes of myself, I'll know  
21 where my -- they're -- where my client's at, I guess at all  
22 times, because I -- you know, I'll need to contact him.

23 THE COURT: That's a good point. I don't know  
24 necessarily they'll be all kept in the same location. They  
25 might end up being in different places. I don't know.

1 MR. LEVENTHAL: In case he has a question -- okay.

2 THE COURT: We'll call the marshals to let them know  
3 that there's a jury note and then they'll make whatever  
4 accommodations they need to make to transport them here,  
5 if they're not already here.

6 MR. LEVENTHAL: Very good.

7 It was brought to my attention earlier that --  
8 somebody thought that maybe one of the jurors had a week-long  
9 vacation next week. I don't know if that's true and I didn't  
10 know if the Court remembered that or . . .

11 THE COURT: No.

12 MR. LEVENTHAL: Does that change anything?

13 I don't know if it's true. It was just mentioned  
14 earlier today that one of the jurors indicated that they had --  
15 that they wanted -- that we thought we could be done by then.  
16 I'm not sure if that's true. But if we're going to -- if  
17 there's going to be a deliberations and then all of a sudden  
18 one week off, I don't know if that changes things.

19 THE COURT: I'll double-check. There was the  
20 individual who had a doctor's appointment last week in the  
21 morning and then I think there was someone else who had a  
22 vacation in late April and I told them, "Oh, we'll be done  
23 before then," but I don't think that -- okay.

24 It's April 25th is the day of the vacation.

25 MR. LEVENTHAL: Okay. Good.

1 THE COURT: On that one juror.

2 MR. LEVENTHAL: I just want to make sure we're not  
3 because then --

4 THE COURT: I'm thinking it was the gentleman on the  
5 top, but I really don't remember, I'm just speaking off the top  
6 of my head, who had something on April 25th.

7 MR. JACKSON: Your Honor, I have one question.

8 If we go out to deliberation on either Wednesday  
9 evening or Thursday morning or whatever, does the Court plan to  
10 keep them over the weekend or is the Court going to release  
11 them because of the Easter holiday and send them home?

12 THE COURT: Right. So they can deliberate -- they  
13 actually choose their own schedule from here on out. They can  
14 be here as early as 8:00 a.m. The only reason we were starting  
15 court at 8:30 is because defense counsel asked for that  
16 adjustment, but they can be here as early as 8:00 a.m. if they  
17 want to be and we do, however, start locking up at 4:30 in the  
18 back room. So, they would need to leave by 4:30.

19 They can come in on Friday, even though that wasn't a  
20 normal court day that we were accustomed to having because I'll  
21 still be here. You all can still be on notice, on call,  
22 rather. I'll be here with other cases, so there's no reason  
23 why they shouldn't be able to deliberate on Friday. But we are  
24 closed on Saturday and Sunday so they will not be deliberating  
25 Saturday and Sunday. If they haven't reached a verdict by 4:30

1 on Friday, then they'll be instructed to come back on Monday,  
2 and again, they can tell us if it's 8:00 or 8:30.

3 MR. JACKSON: It will not be --

4 THE COURT: But we'll -- we'll always let you know.  
5 My courtroom deputy always lets everybody know when the jury  
6 leaves, what time they left, so you can take off your suits and  
7 get comfortable and not worry that you might be called to  
8 court, and also tells you what time to expect that they're  
9 going to be back in, you know, whatever time they tell us  
10 they're going to be coming back so then you know what time you  
11 need to be ready and on call for any question or verdict.

12 MR. JACKSON: So the latest they would deliberate  
13 would be until Friday sometime in the evening?

14 THE COURT: 4:30 on Friday would be the latest that  
15 they would be here on Friday and then they're welcome to come  
16 back on Monday at 8:00 or 8:30, whichever they choose.

17 MR. JACKSON: All right.

18 THE COURT: All right. So it looks like we've  
19 answered all the questions so we'll see you back here on  
20 Wednesday morning at 8:30 a.m.

21 Please make a point of showing each -- opposing party  
22 any of the demonstratives that you're going to use, just to  
23 make sure you're using the right one. There were some things  
24 that were redacted. There were some things that were not  
25 admitted that some people thought were admitted and so let's

1 make sure that we don't -- we've come this far. Let's not make  
2 that mistake. So please, opposing parties, show each other  
3 what it is that you plan to use just to make sure that we  
4 are -- we're all using the correct information.

5 All right. Off record.

6 (Proceedings adjourned at 2:45 p.m.)

7  
8 --oOo--

9 COURT REPORTER'S CERTIFICATE

10  
11 I, Heather K. Newman, Official Court Reporter, United  
12 States District Court, District of Nevada, Las Vegas, Nevada,  
13 do hereby certify that pursuant to Section 753, Title 28,  
14 United States Code, the foregoing is a true, complete, and  
15 correct transcript of the proceedings had in connection with  
16 the above-entitled matter.

17  
18 DATED: 5-20-2017

/s/ Heather K. Newman  
Heather K. Newman, CCR #774  
OFFICIAL FEDERAL REPORTER